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STATEMENT OF THE OWNERSHIP, MANAGEMENT, CIRCULATION, ETC., REQUIRED BY THE ACT OF CONGRESS OF AUGUST 24, 1912,

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FRANK W. GRINNELL.

Sworn to and subscribed before me this 7th day of March, 1928.

Rudolph P. Berle,
Notary Public.
(*My commission expires Nov. 5, 1931.*)

[seal]

Entered as Second-Class Matter at the Post Office at Boston.

THE INITIATIVE PETITION FOR AN ADVISORY POPULAR VOTE FOR THE INFORMATION MASSACHUSETTS CONGRESSMEN AND THE ADVISORY OPINION OF THE JUSTICES IN REGARD TO IT.

House Document No. 214 is an initiative petition "for an Act to ascertain the Will of the People of the Commonwealth with Reference to the Repeal of the Eighteenth Amendment to the Constitution of the United States." It provides for the submission to the voters of the question whether the senators and representatives in Congress shall be requested to support a constitutional amendment repealing the Eighteenth Amendment, and the State Secretary is required to tabulate and transmit the returns.

This petition was duly filed with the State Secretary, following a certificate of the Attorney General to the effect that the measure was in proper form for submission to the people.

Shortly afterwards a petition was filed in the Supreme Judicial Court by Conrad W. Crooker in behalf of William H. Mitchell and others against the Secretary of the Commonwealth for a writ of mandamus commanding him not to issue blank forms of the initiative petition for circulation among the voters, on the ground that the petitioners for the writ of mandamus had previously filed a similar initiative petition. This petition for a writ of mandamus was very properly denied as there is nothing in the amendment to present two initiative petitions for the same purpose, and subsequently the original signers of the initiative petition No. 214 filed a petition for a writ of mandamus commanding the Secretary to issue such blanks, which was granted by the Court, and the blanks were issued accordingly.

After the twenty thousand signatures required by the Forty-Eighth Amendment had been obtained for No. 214 and filed with the State Secretary, Samuel H. Thompson and others filed a petition in the Supreme Judicial Court against the Secretary for a writ of mandamus commanding him to refrain from transmitting the initiative petition to the General Court, alleging that the proposed act was not a "law" or a "measure" under the terms of the Forty-Eighth Amendment. At the argument on this petition it appeared that the Secretary, before he had received actual notice of the proceeding, had transmitted the initiative petition to the General Court, and accordingly the petition was dismissed without prejudice.

The House of Representatives then asked the opinion of the Justices of the Supreme Judicial Court on the question whether or not the act proposed by this initiative petition is a "law" or "measure" (see request annexed to the Opinion herein reprinted, H. 1101) within the meaning of the Forty-Eighth Amendment.

HOUSE . . . . . NO. 214

The Commonwealth of Massachusetts

INITIATIVE PETITION RELATIVE TO AMENDING THE EIGHTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

[Legal Affairs. Dec. 19, 1927.]

OFFICE OF THE SECRETARY,
BOSTON, DECEMBER 19, 1927.

To the Clerk of the House of Representatives.

Under the provisions of Article XLVIII, II, Initiative Petitions, Section 4 of the Constitution of the Commonwealth, I transmit herewith an initiative petition for an act relative to an amendment to the Constitution of the United States, repealing the Eighteenth Amendment thereof, signed by the required number of qualified voters (24,438), together with the preliminary petition signed by ten qualified voters, the certificate of the Attorney General and a copy of the proposed measure.

Very truly yours,
F. W. COOK,
Secretary.

DEPARTMENT OF THE ATTORNEY GENERAL,
BOSTON, SEPTEMBER 7, 1927.

HON. FREDERIC W. COOK, *Secretary of the Commonwealth.*

DEAR SIR:—The following is an appropriate description of the proposed law submitted by initiative petition entitled "An Act relative to an amendment to the Constitution of the United States repealing the Eighteenth Amendment thereof."

DESCRIPTION OF PROPOSED LAW.

The proposed law provides for the submission to the voters of the following question:

Shall the senators from this commonwealth and the representative in congress from this district be requested to support a constitutional amendment to repeal the eighteenth amendment to the constitution of the United States known as the "prohibition amendment"?

and for the tabulation of the returns of votes upon the said question by the Secretary of the Commonwealth by congressional districts and the transmitting of copies of such votes so tabulated to the respective senators and representatives of the Commonwealth in Congress.

Very truly yours,

ARTHUR K. READING,
Attorney General.

CERTIFICATE OF THE ATTORNEY GENERAL.

I, Arthur K. Reading, Attorney General for the Commonwealth of Massachusetts, hereby certify that the within measure which has been submitted to me under the provisions of the Constitution of Massachusetts, Article XLVIII of the Amendments, Subdivision II, Section 3, is in proper form for submission to the people, and that it is not, either affirmatively or negatively, substantially the same as any measure which has been qualified for submission or submitted to the people within three years of the succeeding first Wednesday in December and that it contains only subjects not excluded from the popular initiative and which are related or which are mutually dependent.

ARTHUR K. READING,
Attorney General.

SEPTEMBER 6, 1927.

INITIATIVE PETITION.

BOSTON, JULY 15, 1927.

Secretary of the Commonwealth.

The undersigned qualified voters respectfully petition under Article XLVIII of the Amendments to the Constitution governing the popular initiative, viz., "The Initiative," II, section 3, for "An

Act to ascertain the Will of the People of the Commonwealth with Reference to the Repeal of the Eighteenth Amendment to the Constitution of the United States."

AN ACT TO ASCERTAIN THE WILL OF THE PEOPLE OF THE COMMONWEALTH WITH REFERENCE TO THE REPEAL OF THE EIGHTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Be it enacted by the People, and by their authority:

SECTION 1. There shall be submitted to the voters of each congressional district in the commonwealth at the next regular state election the following question, which shall be placed upon the official ballot to be used at such election:—

Shall the senators from this commonwealth and the representative in congress from this district be requested to support a constitutional amendment to repeal the eighteenth amendment to the constitution of the United States known as the prohibition amendment?

SECTION 2. The state secretary shall tabulate the returns of votes upon the aforesaid question and shall transmit copies of such returns by congressional districts to each senator and representative in congress from this commonwealth. The vote under this act shall not be regarded as an instruction to said senators and representatives in congress, but shall be regarded as the opinion and the will of the people from the several congressional districts of this commonwealth upon said question.

CHARLES S. RACKEMANN,
Brush Hill Road, Milton.

FRANCIS R. BANGS,
190 Marlborough Street, Boston.

JULIAN CODMAN,
Farms Road, Hamilton.

ALEXANDER LINCOLN,
265 Beacon Street, Boston.

ROBERT DICKSON WESTON,
22 Fayerweather Street, Cambridge.

MARTIN T. JOYCE,
10 Albion Road, Quincy.

OTIS T. RUSSELL,
69 Sparks Street, Cambridge.

FRED G. R. GORDON,
562 Main Street, Haverhill.

MARCUS T. FLAHERTY,
Stockbridge Road, Scituate.

HOUSE . . . . No. 1101

The Commonwealth of Massachusetts

OPINION OF THE JUSTICES OF THE SUPREME JUDICIAL COURT.

[March 15, 1928.]

To the Honorable House of Representatives of the Commonwealth of Massachusetts.

The Justices of the Supreme Judicial Court respectfully submit this answer to the question propounded by the order adopted on the twenty-eighth day of February, 1928. Copy of the order is hereto annexed.

The substance of the question is whether a pending matter purporting to be a "proposed law" introduced by an initiative petition is within the terms of art. 48 of the Amendments to the Constitution. The title of the "proposed law" is "An Act to ascertain the Will of the People of the Commonwealth with Reference to the Repeal of the Eighteenth Amendment to the Constitution of the United States." The text of the "proposed law" provides in § 1 that at the next State election there shall be placed upon the official ballot in each congressional district the question "Shall the senators from this commonwealth and the representative in congress from this district be requested to support a constitutional amendment to repeal the eighteenth amendment to the constitution of the United States known as the prohibition amendment?" By § 2 it is stated that the vote thus to be taken shall not be regarded as an instruction to the senators and representatives but as the opinion and will of the people.

The "popular initiative," which by Part I of art. 48 of the Amendments to the Constitution "the people reserve to themselves," is there defined to be "the power of a specified number of voters to submit constitutional amendments and laws to the people for approval or rejection." By "The Initiative," Part II, § 1, of said art. 48, it is provided that an "initiative petition shall set forth the full text of the constitutional amendment or law, hereinafter designated as the measure . . ." Plainly the word "measure" as here used is defined by the Amendment itself to be either a "constitutional amendment" or a "law." It has no wider signification. The "matter" to which the order of February 28, 1928, refers is not a "constitutional amendment." That is confined to an amendment to the Constitution of this Commonwealth. The precise question is whether it is a "law" as used in the initiative Amendment. A word in an amendment to the Constitution is not to be given a constricted meaning but the sense most obvious to the common understanding. *Attorney General* v. *Methuen*, 236 Mass. 564, 573. That part of art. 48 of the Amendments here material is more narrow than the power conferred upon the General Court by c. 1, § 1, art. 4 of the Constitution, whereby full power and authority are granted to the "general court . . . to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without . . ."

Without undertaking to frame a definition of "law" as used in this Amendment sufficiently accurate and comprehensive to meet all the conditions of the future, reference may be made to two definitions given in other jurisdictions in discussing the force and effect of statutes. In *American Banana Co.* v. *United Fruit Co.* 213 U. S. 347, 356, it was said by Mr. Justice Holmes: "Law is a statement of the circumstances in which the public force will be brought to bear upon men through the courts." In *Opinion of the Justices*, 66 N. H. 629, 632, occurs this: "Law 'is a rule: not a transient sudden order from a superior to or concerning a particular person; but some-

thing permanent, uniform, and universal . . .'" The word "law" imports a general rule of conduct with appropriate means for its enforcement declared by some authority possessing sovereign power over the subject; it implies command and not entreaty; it is something different in kind from an ineffectual expression of opinion possessing no sanction to compel observance of the views announced. The text of the proposed law accompanying this initiative petition does not prescribe a general rule of conduct. It merely invites a declaration of opinion by voters on a subject over which the people of the Commonwealth possess no part of the sovereign power. Amendment of the Constitution of the United States and repeal of Amendments thereof constitute Federal functions derived in every particular entirely from the Constitution of the United States. That instrument transcends all provisions sought to be enacted by the people or by the legislative authority of any State. The voters of the several States are excluded by the terms of art. 5 of the Constitution of the United States from participation in the process of its amendment. By that article all power over the subject is vested exclusively in the legislatures of the several States. *Hawke* v. *Smith, No. 1*, 253 U. S. 221, 227. *Leser* v. *Garnett*, 258 U. S. 130, 137. The result of the vote as proposed in this initiative petition would be lacking in any effective force. The proposed law is wanting in features essential to constitute its provisions a law within any permissible conception of the meaning of that word. Superficial appearances cannot clothe with the attributes of law something in substance vain and inoperative. The mandate to the Secretary of the Commonwealth in § 2 to tabulate the returns of the votes and to "transmit copies . . . to each senator and representative in congress from this commonwealth" is subsidiary and incidental to the main purpose of the proposed law; it relates to a matter which standing alone possesses no legal force; it cannot convert into a law something in itself ineffectual.

The certificate of the Attorney General concerns merely

matters of form. *Anderson* v. *Secretary of the Commonwealth*, 255 Mass. 366. Whatever fails to possess elements indispensable for enactment or for submission to the people cannot be made into a "law" by such certificate. *Brooks* v. *Secretary of the Commonwealth*, 257 Mass. 91.

We therefore are of opinion that the matter to which reference is made in the question is neither a "law" nor a "measure" within the meaning of the provisions as to The Initiative in art. 48 of the Amendments to the Constitution. We answer the question in the negative.

ARTHUR P. RUGG.
HENRY K. BRALEY.
JOHN C. CROSBY.
EDWARD P. PIERCE.
JAMES B. CARROLL.
WILLIAM CUSHING WAIT.
GEORGE A. SANDERSON.

The Commonwealth of Massachusetts

HOUSE OF REPRESENTATIVES, February 28, 1928.

Whereas, There purports to be pending before the General Court, under the provisions of Article XLVIII of the Amendments to the Constitution relative to The Initiative, a certain matter, referred to its committee on Legal Affairs, purporting to be a proposed law introduced into the General Court by an initiative petition, which appears in House Document No. 214 of the current year, and is entitled "An Act to ascertain the Will of the People of the Commonwealth with Reference to the repeal of the Eighteenth Amendment to the Constitution of the United States", a copy of which document is herewith submitted; and

Whereas, There exists grave doubt as to whether or not said committee in its consideration of and report upon said matter, and said General Court in its action thereon, are required to follow the procedure prescribed in the aforesaid provisions of said Article XLVIII; therefore be it

Ordered, That the opinions of the Honorable the Justices of the Supreme Judicial Court be required by the House of Representatives on the following important question of law:

Is the above entitled matter a "law" or a "measure" within the meaning of the aforesaid provisions of said Article XLVIII?

FRANK E. BRIDGMAN,
Assistant Clerk, Acting Clerk.

A true copy.
Attest:

FRANK E. BRIDGMAN,
Assistant Clerk, Acting Clerk.

COMMENT ON THE ADVISORY OPINION.

The following carefully prepared comment has been received by the Editor and is here printed as a thoughtful discussion of a public question which deserves consideration by the bar.—ED.

The recent advisory opinion of the justices holding invalid the proposed initiative act "to ascertain the will of the people of the Commonwealth with reference to the repeal of the Eighteenth Amendment to the Constitution of the United States" is based on a definition of the word "law" as used in the Initiative and Referendum Amendment to our state Constitution which seems curiously narrow. The definition there given is:

> "The word 'law' imports a general rule of conduct with appropriate means for its enforcement declared by some authority with power over the subject."

"Law" is a word of many meanings, abstract and concrete, and hence cannot be simply defined. In its root it signifies that which is laid down, or established. Webster's definition of the word in its specific sense is:

> "A rule of (external) conduct or action which is prescribed, or is formally recognized as binding, by the supreme governing authority and is enforced by a sanction."

It is frequently described as a rule of action.[1] This conveys a meaning much broader than "general rule of conduct."

But the word "law" is commonly used to designate an exercise of legislative power, being then synonymous with statute. A leading definition of law in that sense is given by Kent. He says:

> "Statute law is the express written will of the legislature, rendered authentic by certain prescribed forms and solemnities." 1 Kent, Comm. 447.

Bouvier defines "statute" as follows:

> "The written will of the legislature, solemnly expressed according to the forms necessary to constitute it the law of the state." Bouvier L. Dict.

[1] *Davis* v. *Ballard*, 1 J. J. Marsh. (Ky.) 563, 576; *Baldwin* v. *Philadelphia*, 99 Pa. St. 164, 170; 36 C. J. 957, 958.

In *Ware* v. *Hylton*, 3 Dall. 199, 212, it is said:

> "A law is an expression of the public will; which when expressed, is not the less obligatory, because it imposes no penalty."

Similar definitions are numerous.[2]

Mr. Justice Holmes's observation that "law is a statement of the circumstances in which public force will be brought to bear upon men through the courts," in *American Banana Co.* v. *Limited Fruit Co.*, 213 U. S. 347, 356, was a step to the conclusion that the prohibitions of the Sherman Anti-Trust Law do not extend to acts done in foreign countries, outside the jurisdiction of our courts. If the proposed initiative act had been upheld, and if public officials had failed to comply with its terms, they might have been compelled to do so in court proceedings. In *Opinion of the Justices*, 66 N. H. 629, 632, the question was whether the State could take the property of the Concord Railroad for less than its value without the owner's consent. The court said that an order of that sort, for the sole purpose of enriching the State at the owner's expense, would not be legislation. The portion of the opinion quoted in the opinion of the justices of our court is a quotation from Blackstone (1 Bl. Com. 44) given by the New Hampshire justices in support of their opinion that such an order would not be legislation.

In *McGovern* v. *Mitchell*, 78 Conn. 536, 557, the following definition of "laws" is given:

> "The term *laws*, as thus used, clearly denotes action of the General Assembly in its legislative capacity. Their style must be that of enactment. They are the outcome of a bill for an Act which has been presented to the governor for his approval."

See also *Opinion of the Justices*, 118 Maine, 552.

In the Constitution of Massachusetts, outside of the "I and R" Amendment, the term "law" is consistently used as meaning a bill or resolve passed by the General Court and submitted to the Governor for his approval.

Chapter 1, section 1, article 2, provides:

> "No bill or resolve of the senate or house of representatives shall become a law and have force as such until it shall have been laid before the governor for his revisal;"

[2] *Williams* v. *Bruffy*, 96 U. S. 176, 183; *Eakin* v. *Raub*, 12 Serg. & R. 330, 347; *People* v. *Collins*, 3 Mich. 343, 418; *State* v. *Partlow*, 91 N. C. 550, 552; *State* v. *Express Co.*, 164 Iowa, 112, 124; *Federal Trust Co.* v. *East Hartford Fire Dist.*, 283 Fed. 95; *Cooley's Const. Lim.*, 8th ed., p. 183.

Article 42 of the amendments gave to the General Court full power and authority "to refer to the people for their rejection or approval at the polls any act or resolve of the general court or any part or parts thereof," and provided that "any act, resolve or part thereof so referred . . . shall become law if approved by a majority of the voters voting thereon." This article was annulled by article 48, the "I and R." Amendment, for the reason that it was considered to be superseded by the provisions "for a referendum to the people upon any law enacted by the general court" not therein expressly excluded.

Conformably to the practice established by the Constitution the General Court annually passes acts and resolves which, when approved by the Governor, become laws and are so recorded in the annual blue books. Resolves, it is true, are not in the style of enactment; but under the Constitution they are laws when approved. (See MASSACHUSETTS LAW QUARTERLY, Vol. IV, p. 152.) Joint resolutions, on the other hand, by which the Legislature ratifies or rejects a proposed Federal Amendment or adopts some form of memorial to Congress, are not a part of the acts and resolves, and are not so recorded. These are not laws.[3]

Many of the acts of our General Court and most, if not all, of the resolves are not general rules of conduct and hence would not come within the definition given in the opinion of the justices. Appropriation acts and many local acts do not import a general rule of conduct, but they are none the less laws.[4] Such acts are excluded from the operation of the 48th Amendment not by a narrow definition of the term "law", but by express provision.

In the "I and R" Amendment the term "law" is used to describe legislative action either by the General Court or by the people, whose law making power under that system is co-ordinate with the Legislature, except as to those matters which are excluded.[5] There would seem to be no good reason for limiting that power when exercised by the people, over subjects not excluded, by a construction which would fail to include anything which, if the power were exercised by the Legislature, would be a law.

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[3] *Moulton* v. *Scully*, 111 Maine, 428; *Opinion of the Justices*, 118 Maine, 544; *Opinion of the Justices*, 118 Maine, 552, 557; *Whittemore* v. *Terral*, 140 Ark. 493; *Herbring* v. *Brown*, 92 Or. 176; *Prior* v. *Noland*, 68 Colo. 263; *Decher* v. *Secretary of State*, 209 Mich. 565.

[4] *Federal Trust Co.* v. *East Hartford Fire Dist.*, 283 Fed. 95; *Hopping* v. *Richmond*, 170 Cal. 605, 612.

[5] *Kadderly* v. *Portland*, 44 Or. 118, 145; *Straw* v. *Harris*, 54 Or. 424; *Allen* v. *State*, 14 Ariz. 458, 467; *Hodges* v. *Dawdey*, 104 Ark. 583, 595; *Baird* v. *Burke County*, 53 N. D. 140; *State ex rel. Berry* v. *Superior Court*, 92 Wash. 16, 25.

The case of *Hopping* v. *Richmond,* 170 Cal. 605, 616-618, is an authority against the rule given in the opinion. It was there held that the initiative and referendum was not limited to general acts declaring rules of civil conduct, but was applicable to other measures having a restricted operation.

Statutes providing for advisory referenda are not uncommon. We have in the General Laws a statute (G. L. c. 53, sec. 18) for ascertaining the opinion of the people as to proposed amendments to the Federal Constitution. Such laws clearly do not prescribe general rules of conduct, nor have the results of votes cast under them any effective force, but they may have much practical force, as in the case of the referendum on the Child Labor Amendment. Concerning the practice of thus ascertaining the opinion of the voters on questions of public interest the court said in *Fuller* v. *Mayor of Medford,* 224 Mass. 176, 179:

> "It is no idle form to secure a definite conception in this form (advisory expressions of public opinion by the voters) of what the people think on any subject of general interest."

And in *Locke's Appeal,* 72 Pa. St. 491, the court said:

> "Instead of being contrary to, it is consistent with, the genius of our free institutions to take the public sense in many instances, that the legislators may faithfully represent the people and promote their welfare."

It has been held also that a referendum on the subject of licensing the sale of intoxicating liquor does not violate the Eighteenth Amendment or the Volstead act. *Jones* v. *Cutting,* 238 Mass. 218.

An act providing for an advisory referendum is essentially different from a memorial, in that it prescribes a rule of action and expresses the legislative will in that respect, whereas a memorial is merely a petition or expression of desire. In an act for a referendum the action prescribed is in its essence the placing of the measure on the ballot. The initiative act which the justices have held to be unauthorized by the 48th Amendment was of that sort. It did not simply request senators and representatives in Congress to support the repeal of the Prohibition Amendment,—it provided that the question whether they shall be so requested shall be submitted to the voters and placed upon the official ballot. Is not such a provision a rule of action capable of being enforced?

EDITORIAL NOTE.

When the advisory opinion of the justices as to the scope of the initiative and referendum is closely studied it appears to be of more far-reaching importance than is generally realized. We had considered the question with some uncertainty before the opinion was rendered, but, on examining it in order to test the conclusion in the light of the comments received and printed above, we believe that the justices have outlined the course of future interpretation of the Initiative and Referendum Amendment in such a way that parts of the opinion will become constitutional landmarks for the future.

In his "Nature and Sources of the Law" (on page 173, 2nd Ed.), the late John C. Gray said, as to the interpretation of statutes:

> "The fact is that the difficulties of so-called interpretation arise when the Legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the Legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present."

The same is true, of course, of the constitution. From a considerable familiarity with the history of the Initiative and Referendum Amendment and the debates in regard to it, we feel safe in saying that neither the members of the convention, nor the people in voting on the amendment, had in mind the specific question which is the subject of the opinion of the justices. Accordingly, they had not formed a definite opinion in regard to it. Under these circumstances, it is necessary for the court to work out a definite line of interpretation to cover such unforeseen questions.

In the comments printed above, parts of the reasoning are criticised and particularly the applicability of the quoted definitions of "law". In connection with these quotations, however, it is significant that the court refers to them "without undertaking to frame a definition of 'law' as used in this amendment sufficiently accurate and comprehensive to meet all the conditions of the future". In preparing an advisory opinion for the legislature in answer to a question of this kind in the midst of a legislative session, it is not to be expected that the court should prepare an exhaustive

analysis of all definitions of "law" or "laws". In the comment above it is pointed out that the definition of "Law" used by the justices, as "a general rule of conduct" is substantially that of Blackstone (Vol. I, 44), and it is suggested that "rule of action" is broader and more appropriate. But Blackstone used "action" and "conduct" interchangeably as appears on page 46 of Vol. I.

The important and far-reaching portions of the opinion which outline the course of future interpretation of the Initiative and Referendum Amendment are to be found in the following sentences, and particularly in the first of the following sentences:

> "That part of art. 48 of the Amendments here material is more narrow than the power conferred upon the General Court by c. 1, §1, art. 4 of the Constitution, whereby full power and authority are granted to the 'general court . . . to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without.' . . .
>
> "The word 'law' imports a general rule of conduct with appropriate means for its enforcement declared by some authority possessing sovereign power over the subject; . . . The text of the proposed law accompanying this initiative petition does not prescribe a general rule of conduct. It merely invites a declaration of opinion by voters. . . .
>
> "The mandate to the Secretary of the Commonwealth in §2 to tabulate the returns of the votes and to 'transmit copies . . . to each senator and representative in congress from this commonwealth' is subsidiary and incidental to the main purpose; it can not convert into a law something in itself ineffectual.
>
> "The certificate of the Attorney General concerns merely matters of form. *Anderson* v. *Secretary of the Commonwealth,* 255 Mass. 366. Whatever fails to possess elements indispensable for enactment or for submission to the people can not be made into a 'law' by such certificate. *Brooks* v. *Secretary of the Commonwealth,* 257 Mass. 91."

The special importance of the first sentence quoted above is that it recognizes a difference between the broad general *representative* powers granted in 1780 to the General Court as "the great representative constitutional body" referred to in the tenth article of the Bill of Rights and the narrower "law" making power, part of which was separated and, to a limited extent, granted by the I. & R. Amendment to ten individual citizens and those who supported them with signatures.

The question turns on a comparison of the "Definition" of the I. & R. Amendment with these broad general powers granted to the General Court "to make, ordain and establish *all manner of* wholesome and reasonable *orders, laws, statutes,* and *ordinances, directions* and *instructions* either with penalties or without." These words appear both in the Province Charter, and the Colony Charter of 1629.

In the comment above printed, it is suggested that "the word 'law' is commonly used to designate an exercise of legislative power, being then synonymous with statute." But it is not so used in the Massachusetts Constitution, which distinguishes between "laws" and "statutes" and "orders", "ordinances" and "directions" and gives the General Court power to make them all; whereas the I. & R. specifies "laws." "Statutes" is obviously a broader term than "laws" and the word "statutes" is not used in the I. & R. Amendment. When the constitution was adopted in 1780 Blackstone was the law book commonly studied* and referred to and Blackstone's definition of "law" is not only a reasonable, but the most probable, meaning of the word.

The word "laws" being thus deliberately used in the body of the constitution to mean something narrower than "statutes," when we come to consider the I. & R. Amendment it must be assumed that it was used in the same narrower sense there. There is nothing in the history of the convention of 1917 to indicate any broader intention. Having been called into existence to study the constitution, they must be presumed to have deliberately chosen the narrower word "laws" and avoided the word "statutes" which might cover more than "laws." Again various kinds of rules may have the force of *law, i. e.,* rules of court, town by-laws, city ordinances, etc., but they are neither "statutes" nor "laws" strictly speaking, as it was then used. We are not to assume that John Adams and his contemporaries were merely piling up an accumulation of synonymous words in the grant of the broad respresentative power to the General Court. They understood pretty well what they were doing in those days and they were certainly familiar with Blackstone. They doubtless knew also that Lord Coke had distinguished between statutes and ordinances. (See Hargraves and Butters' Notes to Coke's First Institute, 159b, Note 292.) They knew

* Blackstone's Commentaries first appeared between 1765 and 1770. James Otis told his brother after their appearance that "Blackstone's Commentaries would have saved him seven years' labour poring over and delving in black letter" (see Tudor's "Life of James Otis," p. 10).

that a "statute" might be used for purposes other than the making of a "law", as that term was understood, and it is safe to say that no lawyer of that time would have considered the asking of a question of the electorate as a "law," even if done by statute, whether it was for the information of representatives of the Federal or State government. The asking of such questions would more naturally have been considered "directions" rather than "laws" because that is exactly what they are—directions to the State Secretary to submit questions.

The fact that we have a public opinion "law" in the form of a statute by which voters in the different districts may give advisory instructions to their representatives does not affect the soundness of this distinction. The public opinion "law" seems a general rule "of conduct" or "action" provided for those who wish to seek such popular expressions. Because of its general character, it seems to differ materially from the "direction" (using the constitutional word) to ask for a single expression of opinion throughout the Commonwealth such as is contained in H. 214.

Another sentence in the opinion of the justices which is of special importance is the statement that the certificate of the attorney general which is provided for "concerns merely matters of form". The language used in the opinion in the case of *Anderson* v. *The Secretary of the Commonwealth*, 255 Mass. 366, which was discussed at length in the MASSACHUSETTS LAW QUARTERLY for August, 1926, pages 90–96, appears to have been understood by some as extending the scope and force of the attorney general's certificate to such an extent that the court had nothing to do but to accept the ruling of the attorney general as final upon almost all questions which might arise as to the nature and contents of an initiative petition. The sentences quoted from the opinion of the present justices demonstrate the fact that this is not the case; that the attorney general's opinion is not a final judgment substituted for the judicial duty of the court as to any matter of substance which is not "*merely* matter of form".

We believe that the justices in their opinion have done a great public service in outlining for the future a sound interpretation for the guidance of the community which is supported by the words used in the constitution and by our constitutional history. The General Court, as the great representative body of the Commonwealth, may still provide for popular expression of opinion upon specific questions whenever it deems it expedient to issue "direc-

tions'' that this be done, but, under this opinion, the petition-signing method of procedure is limited in accordance with the reasonable purposes of the amendment.

F. W. G.

ANALYSIS OF THE DEFINITION IN THE I. & R. AMENDMENT.

Few persons have considered this carefully but it is of importance and may have some bearing on the question discussed above.

The I. & R. Amendment opens as follows:

Definition.

> ''Legislative power shall continue to be vested in the general court; but the people reserve to themselves the popular initiative, which is the power of a specified number of voters to submit *constitutional amendments and laws* to the people for approval or rejection; and the popular referendum, which is the power of a specified number of voters to submit laws, enacted by the general court, to the people for their ratification or rejection.''

When the facts are considered, however, it appears that the word ''reserve'' is not supported by the facts. It is a rhetorical word and can not obscure what actually took place. This was brought out in the most illuminating manner while the convention was still in session by ''W. M. W.'' (William M. Warren), one of the closest observers of the sessions of the convention, in an entertaining account which appeared in the *Boston Herald* for November 18, 1917. In discussing the ''definition'' he said, ''Just try to think it through. 'The people reserve to themselves . . . the power of a certain number of voters,'—that is to say, a certain number of voters, not specified, have a power which the people reserve to themselves. See?'' (Cf. another discussion of the ''definition'' in the *Herald* for November 29, 1917.)

On ''thinking it through'' as Mr. Warren suggested, the only reasonable result of the language as applied to the facts is that the rhetorical word ''reserve'' could have no intelligible meaning when applied to the facts except the meaning of a limited special grant. This appears even more clearly when it is realized that it was a grant of power to ten citizens and their supporting signers to be the instruments of compelling the legislature to do certain things and thereafter compelling the voters of the whole Commonwealth to vote upon certain questions and, in case of a certain majority of the

votes cast (even in bad weather on election day) to impose their will upon all the people of the Commonwealth through the law thus adopted. The placing of such power in the hands of any ten citizens supported by signatures is of such a nature that we must analyze the rhetoric used in describing it as Mr. Warren did in the passage quoted.

This is not said in any spirit of hostility toward the Initiative and Referendum Amendment; it is simply saying that in studying so powerful a piece of governmental machinery it is essential that we should use common sense in applying the language to the facts. A fuller discussion of the subject in connection with the question whether the initiative included the power to petition for a constitutional convention will be found in the MASSACHUSETTS LAW QUARTERLY for July, 1924, pages 33–51. As there pointed out the submission of the question of calling a constitutional convention is, under the Massachusetts Constitution, a unique *representative* act differing in character from any other action which can be taken by the General Court. The debates in the Convention of 1917 contain clear evidence that the convention formed the definite intention of leaving the power to initiate that unique action in General Court exactly as it has been since 1780. The positive evidence of this intention in the debates and the unique *representative* character of a convention act, as distinguished from other legislative action, together show that it is not within the I. and R. provisions. It is a matter of such far-reaching importance that it could not be brought within the power of the signature machine except by clear language expressing a specific intention to include it. The Opinion of the Justices in regard to House 214, recognizing the distinction between the broad powers of the General Court and the ordinary *law making* covered by the I. and R., is of far-reaching significance when this question is considered, for if House 214 is not within the Initiative it seems clear that a convention act would not be within it.

F. W. G.

Note.

As to the "presumption" of validity of an act of the legislature see *Adams* v. *Howe,* 14 Mass. 340, 345. As to whether there is any presumption of any kind in regard to initiated acts under the I. & R. see MASSACHUSETTS LAW QUARTERLY for Aug., 1924, p. 38.

REGINA v. STERNAMAN: A UNIQUE CASE IN CRIMINAL PRACTICE.

The Honourable WILLIAM RENWICK RIDDELL, LL.D., D.C.L., &c.,
Justice of Appeal, Ontario.

The almost casual reference in my recent article on the Sacco-Vanzetti Case,[1] of our Canadian case, *R.* v. *Sternaman (1898) 1 Can. Cr. Ca., 1,* has caused many American lawyers to write me about it and ask for further information concerning it—most of the inquiries being as to our practice in appeals in criminal cases and the power of the Minister of Justice to grant a new trial. In this paper, I shall try to answer these inquiries, at least in part.

At Cayuga in the County of Haldimand and Province of Ontario, a true bill was found against the accused for the murder in August, 1896, of her husband by arsenical poisoning. Her trial took place, November 17, 18 and 19, 1897, before Chief Justice Armour (then Chief Justice of the Queen's Bench, later Chief Justice of Ontario and finally, Justice of the Supreme Court of Canada) and a jury, resulting in her conviction.

The evidence appeared to prove conclusively that the death was due to arsenical poisoning while the accused was living with and attending on her husband. The Crown in order to show that the poisoning was intentional and not accidental put in evidence to prove that her former husband had been taken suddenly ill after eating food prepared by her and that the symptoms and circumstances attending his illness and death were similar to those attending the illness and death of the second husband. This evidence having been objected to, the Chief Justice "Reserved a Case" for a Divisional Court: a Divisional Court composed of Boyd (afterwards Sir John Boyd), Chancellor, and Rose and Falconbridge (afterwards Sir Glenholme Falconbridge) JJ., held, January 3, 1898, the evidence properly receivable.

This practice is now to be described.

At the Common Law, there was no New Trial in cases of Felony—*Reg. v. Scaife (1851) 17 A. & E., N.S., 238* stands alone and it has been authoritatively discredited: *Attorney-General, N.S.W. v. Bertrand (1867) L.R. 1 P.C., 520*—I am not, of course, referring

[1] *The Sacco-Vanzetti Case from a Canadian View-point:* "American Bar Association Journal" (December, 1927), pp. 683, *sqq.:* An abstract of this article appears in Current Events (March, 1928), pp. 839, *sqq.*

to the writ of *venire facias de novo juratores,* which, while not an order for a New Trial, had substantially the same effect and was granted where a jury was discharged without verdict, a special verdict was insufficient or there was an imperfect or misunderstood verdict.

It may be worth while to mention one case of the kind, which seems to have been overlooked by the text-writers.

In *19 Howell's State Trials, 680,* mention is made of the Case of Ashley and Simons the Jew. Simons on the trial in 1751 of one Goddard, gave evidence for the prosecution: Goddard being acquitted prosecuted Simons for perjury; the jury found him Guilty, as it was supposed; but they all made affidavit that they did not intend to do more than find that what he swore to was not true but not wilfully untrue and that what they gave as their verdict was misunderstood. A *venire de novo* was awarded and a new trial had, "the first precedent of the kind to any person who had been convicted of a criminal offence": *do., do.,* 692, note.

But the strict limits of the practice are shown in *Rex v. Canning (1754) 19 St. Tr., 283,* where two jurors swore that while they agreed in the verdict of Guilty in a prosecution for perjury, they did not intend to do more than find that the accused had sworn to what was in fact untrue. The Court, however, refused to grant a new trial, as in this case the verdict was correctly taken whereas in the Ashley and Simons case, "The judge took a wrong verdict which was not the meaning of the jury": *do., do.,* 672, 673.

I have elsewhere given an historical account of the statutes concerning New Trials in this Province[2]: in 1897, 8, the practice was governed by the Criminal Code of 1892, 55–56 Viet., c. 29 (Dom.) which by s. 743, after abolishing proceedings in Error, authorized the Trial Judge "to reserve any question of law . . . for the opinion of the court of appeal . . ." At that time in Ontario "The Court of Appeal" for the purposes of the Criminal Code was a Divisional Court of the High Court of Justice and composed of three Judges—we shall see that this has since been changed.

The appeal failing in the Divisional Court, there was no further appeal, as the Judges were unanimous—had there been a dissent, an appeal might have been taken to the Supreme Court of Canada: Code, s. 742.

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[2] *New Trial in Present Practice:* 27 "Yale Law Journal" (January, 1918), pp. 353, *sqq.;* and cf. *New Trial at the Common Law:* 26 "Yale Law Journal" (November, 1916), pp. 49, *sqq.*

All that was open to the prisoner was to make "application for the mercy of the Crown", and such an application was made.

Now was brought to light, by what many would regard as an intervention of Providence, a fact which changed the whole situation. The death of the unfortunate man had been attributed to arsenical poisoning chiefly because arsenic had been found in considerable quantities in the body on the postmortem examination. The prisoner insisting on her innocence, her Counsel made diligent search for a possible source of the arsenic and at length discovered that the embalming fluid used in the body before suspicion was aroused contained arsenic. This fact was made to appear to the Minister of Justice, the Hon. David Mills, afterwards a Puisné Justice of the Supreme Court of Canada.

In the Code, s. 748 provides, "If upon any application for the mercy of the Crown on behalf of any person convicted of an indictable offence, the Minister of Justice entertains a doubt whether such person ought to have been convicted, he may, instead of advising Her Majesty to remit or commute the sentence, after such inquiry as he thinks proper, by an order in writing direct a new trial at such time and before such court as he may direct"—this law is still in force. Of course, "advising Her Majesty" was part of the camouflage with which our Constitution abounds, a method by which we keep the old traditional forms while having revolutionized the spirit, for "the letter killeth and the spirit giveth life,"—Canada is in fact governed by the Cabinet and Her Majesty knew no more about and had no more to do with the matter than the President of the United States. So, too, the acts of the Minister of Justice in the exercise of his official duties, the Cabinet, the Administration, the Ministry, as a whole must accept responsibility for: accordingly, Mr. Mills laid the facts before a Cabinet meeting. The determination of the Cabinet appears in the order of the Minister of Justice, although couched in language indicating the conclusion to be his own,—camouflage again.

The formal order will be found in *1 Can. Cr. Ca., pp. 3, 4.* After reciting the indictment, trial, conviction and application for mercy, it proceeds:

> "I, the . . . Minister of Justice . . . having considered the evidence taken and the proceedings had at the trial, although I entertain no doubt as to the propriety of the said conviction . . . upon the said evidence and proceedings, yet inasmuch as representations have been made upon the said

> application for clemency, and evidence and circumstances called to my attention which were not presented at the trial, or considered by the learned Chief Justice or the Jury, which throw doubt on the propriety of the said conviction, and on account of which, I entertain a doubt whether the 'prisoner' ought to have been convicted, and having made such enquiry as I think proper . . ."

A new trial was ordered before the High Court of Justice for Ontario, May 3rd, 1898.

On that day she appeared before a Jury and, the arsenic being now accounted for, was acquitted.

This is a unique proceeding, the order for a New Trial being without precedent, and none having been since made.

The practice of appeal in criminal cases has since been changed and now there is an appeal as of right without the necessity of the Trial Judge "Reserving a Case": and the Court of Appeal is a Divisional Court of the Appellate Division of the Supreme Court of Ontario composed of five judges with a further appeal to the Supreme Court of Canada if there is any dissent in the Court of Appeal.

WILLIAM RENWICK RIDDELL.

OSGOODE HALL, TORONTO, March 12, 1928.

A SUMMARY OF THE NEW POOR DEBTOR LAW (WHICH TOOK EFFECT MARCH 1, 1928) WITH PRACTICAL NOTES PREPARED BY THE ADMINISTRATIVE COMMITTEE OF DISTRICT COURTS.

As the following summary has been circulated to all the justices and clerks of the district courts by the Administrative Committee, it is here reprinted for the convenience of the bar in practice under the new act which has just taken effect. F. W. G.

COMMONWEALTH OF MASSACHUSETTS.

ADMINISTRATIVE COMMITTEE OF DISTRICT COURTS.

MARCH 1, 1928.

TO THE JUSTICES AND CLERKS:

The enclosed summary is intended simply as a helpful factor in interpreting and applying the new Poor Debtor Law. The forms have been prepared for the Municipal Court of the City of Boston and approved for use by District Courts when adapted by obvious verbal changes. The samples enclosed are proofs only. It is possible that there may be some changes before they are issued in final form. The adapted forms may be obtained from the Peck Printing Company, 123 North Street, Boston. We are indebted to this company and to the officials of the Municipal Court for the samples herewith transmitted.

The January number of the Boston University Law Review has an able and helpful analysis of this law by Mr. Bernard Ginsburg.

FRANK A. MILLIKEN,
JAMES W. MCDONALD,
CHARLES L. HIBBARD.

COMMONWEALTH OF MASSACHUSETTS.

ADMINISTRATIVE COMMITTEE OF DISTRICT COURTS.

Summary of Poor Debtor Law with Suggested Forms.

General Laws Ch. 224, Acts of 1927, Ch. 334. Briefly stated the new Poor Debtor Law provides for arrest on mesne process, arrest on execution, supplementary process, and, in addition to orders for delivery or transfer of property, orders to pay judgments and costs in full or by partial payments from time to time. The so-called Dubuque Law, G. L. c. 225 is repealed. The new law is effective March 1, 1928.

The first five sections of the old law (Ch. 224) are retained except clauses three and five of section 2. These are changed as follows:

Old Law	New Law
Third. That he believes and has reason to believe that the defendant intends to leave the Commonwealth so that execution if obtained cannot be served upon him.	*Third.* That he believes and has reason to believe that the defendant intends to leave the Commonwealth so that supplementary proceedings will not be effective against him.
Fifth. That he believes and has reason to believe that the defendant has property not exempt from being taken on execution which he does not intend to apply to the payment of the plaintiff's claim.	*Fifth.* That he believes and has reason to believe that an examination of the defendant will disclose property of the defendant which ought to be held as security for any judgment the plaintiff may recover.

Note—Arrests on mesne process can only be made

1. If debtor intends to leave the Commonwealth, or
2. Debtor is an attorney-at-law or collector, etc.

The certificate has to be made by the Courts to which the writ is returnable. This bars action on writs from other District Courts or the Superior Court.

The affidavit and certificate should follow the wording and requirements of the statute.

If more than one defendant, the subject of arrest must be shown.

Sections six to thirty of the old law are inserted under section 2 of Ch. 334. The various details of jurisdiction are plainly stated in the new section six.

Execution arrest can be made only on allegation and proof of belief and reason to believe that the defendant intends to leave the state and so get beyond reach of civil process. (Section 6.)

In either form of arrest (mesne process or execution) the officer must give the prisoner "reasonable time" to get bail or sureties for recognizance.

Note—The bail bond is under the provisions of G. L. ch. 226 and should run to the sheriff. Conant vs. Sheldon, 4 Gray 300.

Recognizances should follow the wording of the statute.

If arrest is made when Court of jurisdiction is sitting, prisoner should be taken before it before adjournment if recognizance or bail under section 13 by mesne process prisoner has not been previously given, as officer has authority to himself commit to jail only in case arrest is made when Court is not sitting.

The terms of recognizance to free from arrest are stated in section six; it may be given before the Court or if defendant so requests before a Master in Chancery.

When taken before the Court, if there is failure to give recognizance or bail, Court will commit prisoner to jail to await such security or time for examination.

Execution process prisoner may seek and obtain examination on charge of intent to leave Commonwealth and if successful in that examination creditor may proceed under supplementary process (sections 15-16).

If unsuccessful he remains under arrest with a necessity to get recognizance to free himself or to invoke such general examination by acting under section 14.

If execution prisoner has given recognizance, he should proceed within time limit thereof under section 14.

Mesne process prisoner (if he has not given bail under section 13 which ends all mesne process proceedings) whether he has or has not given recognizance should get time and place for examination set by the Court as provided in section 9 and should serve notice of it on the plaintiff as therein provided. When first before the Court this may be done by simply requesting it and the Court will thereupon set time and place and give sufficient oral notice of it to plaintiff through the arresting officer. (Section 9.) Later request to Court requires $3. fee for notice plus officer's fees for service.

Execution prisoner may get time and place set for his special examination and notification to creditor as provided in section 9 but for his more general examination as a judgment debtor he should proceed as provided in section 14.

Plaintiff or creditor must pay the Court fees required in main section 3, page 447, Acts of 1927 or he may lose prisoner from arrest. (Section 9.)

Note—Sections 7 to 13 (Ch. 334) apply to the defendant after an actual arrest. Sections 7 and 8 provide for the surrender of the principal by his sureties and the giving of a new bond on recognizance and the remedy on this bond.

Examination in Mesne Process.

The scheme for examination of a mesne process defendant under sections 9, 10 and 11 is plain. If he can prove to the Court either that he did not or does not intend to leave the Commonwealth or that he has no property amenable to the proceedings or if he has any that he has obeyed all orders about it he is discharged and the proceedings end. (Section 10.)

If he fails to satisfy the Court on either one of these points, the proceedings are relegated by the statute to the supplementary process proceedings (sections 14 to 17), the ultimate proceedings for which the statute provides. The defendant is committed to jail by the Court until released by bail or bond under section 13 or by written order of plaintiff or his attorney (section 10) and the property found amenable is made over in trust as ordered by the Court to be so held for thirty days after final judgment to give the plaintiff opportunity if he gets judgment to reach it in supplementary proceedings following the final judgment. (Sections 10 and 11.)

To prevent the defendant being released from jail plaintiff must start supplementary proceedings within ten days after final judgment and to reach the property so made over in trust must start such proceedings within thirty days after final judgment. (Sections 10 and 11.)

Such property will be re-conveyed to defendant if plaintiff fails to invoke supplementary proceedings within such time limit or refuses to receive the property or to pay costs of the trust. (Section 11.)

Supplementary Process Proceedings.

Supplementary process proceedings in sections 14, 15 and 16 are plain in their provisions.

Note—If there is more than one judgment debtor they can be summoned on one citation but each defendant must be served with process. Stearns vs. Hemenway, 162 Mass. 17.

Supplementary process proceedings are available alike to any judgment creditor and to any judgment debtor. They seek property not exempt from being taken on execution, available for transfer or to be taken on execution to satisfy or apply upon the judgment debt and costs; and for money or income from which the Court may order the debt and costs paid or instalments paid on it. The Court is given authority to make all orders appropriate to its ends, to combine any proper orders, and to control all details. (Section 16.)

The Court may order property of any kind, not exempt, transferred to creditor or person in his behalf or delivered to be taken on execution. (Section 16.)

It may order instalment payments allowing from income a reasonable amount for support of debtor and family which amount need not be stated. This opens to all kinds of judgment what has heretofore been confined to those coming within the so-called Dubuque process.

Note—For authority to make such order, see Tehan vs. Justice Municipal Court, 191 Mass. 92.

Debtor may redeem personal property so transferred within sixty days and real property so transferred within one year by paying judgment, costs and expenses on the property in full, and if not so redeemed it shall be sold forthwith at public auction unless the transfer otherwise provided and the proceeds applied to expenses of care, custody and sale of the property, payment of judgment debt and costs, surplus if any going to creditor or creditor may take the property at valuation fixed by debtor in the transfer and apply as above. (Sec. 17.)

Creditor may refuse transfer without impairing right to levy on other property of debtor. If after transfer and before sale the execution is fully satisfied, the Court shall order re-conveyance and may enforce it by contempt process. (Sec. 17.)

Fraud Charges.

Pending examination plaintiff or creditor may file written sworn charges against defendant or debtor, alleging that since debt was contracted or cause of action accrued, he has conveyed, concealed or disposed of property, in order to keep it for himself or defraud creditors; or within same time has hazarded his money or property to value of $100. in gaming prohibited by laws of Commonwealth; or, in case action was founded on contract debt, that defendant or debtor contracted it with intent not to pay it. This shall be in nature of action at law; defendant or debtor may plead guilty or not guilty; and Court may hear and determine it. Evidence limited to charges filed and to acts within 3 years before commencement of original action. (Section 19.)

If defendant or debtor is found guilty, sentence of not more than one year in jail is mandatory and Court may make any necessary continuance of the other proceedings. (Section 19.)

Either party may appeal to Superior Court from any judgment under this section; party appealing being required to give recog-

nizance with sureties with conditions as stated in the section. Trial in Superior Court to be by jury, or, by mutual consent, by the Court. (Section 19.)

Note—See Doane vs. Bartlett, 4 Allen 74. Charges of fraud should be alleged with fullness, clearness and precision and accompanied by a bill of particulars if necessary. Amendments may be allowed. Better practice would seem to be to make the charges in the exact words of the statute and file the bill of particulars. See Stockwell vs. Silloway, 100 Mass. 287.

If the debtor is found guilty a sentence should be imposed before an appeal can properly be taken. Morse vs. O'Hara, 247 Mass. 183. Charges of fraud may be made either on mesne process or upon the debtor's examination as to his property. Horton vs. Weiner, 124 Mass. 92.

Transfer of Payment in Contempt.

If examination shows that debtor in supplementary process has paid money or transferred property since service of the process with intent to prevent it from being transferred or applied on account of this judgment and the Court so certifies, the debtor in discretion of Court may be committed for contempt. Payment of debt for necessaries or on judgment on which he has been previously summoned in like proceedings or reasonable fee for counsel with reference to the proceedings shall not put debtor in contempt. (Section 20.)

Note—See Connors case 254 Mass. 103.

The Court must make a certificate to the above effect.

Dismissal on Full Judgment or Bond.

Supplementary proceedings shall be dismissed and debtor if imprisoned discharged, on full settlement with creditor or his attorney of judgment and costs, or, if judgment is not on bond or recognizance given under this chapter, by giving bond with approved sureties to make such settlement within sixty days from date of bond, or longer time if the Court so allows. (Section 21.)

Miscellaneous Provisions.

There are various miscellaneous provisions, as follows:

Section 6. Officer doubtful of identity or of lawfulness of arrest may require indemnity security. Officer liable in tort for permitted or negligently allowed escape.

Section 7. Surety may surrender principal and so relieve himself.

Section 8. Suit on broken recognizance or bond, with time limit and details.

Section 12. Support of defendant or debtor in jail, with release if plaintiff or creditor fails to pay or secure it on demand.

Section 18. Warrants and processes for contempt; penalties; speedy hearings; and other details.

Contempt sentence is interlocutory and does not end proceedings, which remain until expressly dismissed by Court. When so dismissed, not to be renewed for one year.

No appeal under this Chapter, except under Section 19.

Section 22. Habeas corpus to get imprisoned defendant or debtor before Court, for bond, examination or disposition.

Section 23. Qualified constables, sheriffs and deputy sheriffs may serve any process.

Sections 24, 25 and 26. Supplementary proceedings for debtor in prison under warrant of distress in favor of Commonwealth, with details of procedure.

Section 27. Procedure if defendant or debtor imprisoned is supposed to be insane.

Section 28. Discharge of poor person in jail for non-payment of a tax.

Section 29. Discharge of insolvent or bankrupt defendant or debtor.

Section 30. Power of Court for adjournments and other incidents; and obligation of summoned witnesses to attend.

Main sections 3 and 4 of said Chapter 334.

Detailed statement of costs, fees and expenses of the proceedings in all their phases.

Main section 5.

Supplementary proceedings for person in jail for non-payment of a tax, with details.

Main section 6.

Note—All commitments for contempt are to be to the jail, not to the House of Correction, G. L. ch. 220, section 14.

Hurley *vs.* Commonwealth, 188 Mass. 443.

Suggested forms are appended although for commitments for contempt they must vary as to the particular circumstances of each case.

HITHERTO UNPUBLISHED MANUSCRIPT ACCOUNT BY JUDGE EDMUND TROWBRIDGE RELATING TO CHIEF JUSTICE OLIVER AND THE JURIES IN 1773–1774.

A brief account of Chief Justice Oliver with portraits appears in the special number of the QUARTERLY *for December, 1927, issued in connection with the annual meeting of the Association in Plymouth, the following paper was prepared for the annual meeting.*

INTRODUCTORY NOTE.

As the late Mellen Chamberlain said, "It is of more than passing consequence that we withhold no tribute of just praise from those unpopular men who deserve the respectful remembrance of their countrymen." Peter Oliver had the courage of his political convictions and paid the price. As a judge he "deserves respectful remembrance" for he appears to have been one of the strongest men on the Massachusetts bench and by his firmness, impartiality and judicial courtesy prior to the political crisis that ended his judicial career, helped to establish the traditions of his great office in the administration of justice.

When he was a young man, he began to collect a library and is said to have transcribed several local histories,—all of these apparently were destroyed with the rest of his library when his house was burned by the patriots.

Mrs. Oliver, whose virtues were set forth at length in the inscription reprinted in the special number of the QUARTERLY for December 17, 1927, at the annual meeting of the Association, appears to have been a very unusual person. She was the daughter of William Clark, of Boston, a well-known man who was a member of the General Court from 1731–1734.

Judge Oliver was one of the judges who is represented in Reid's painting on the walls of the State House listening to the argument of James Otis on the Writs of Assistance. As the latest appointee before that argument, he was presumably the judge sitting on the extreme left of the chief justice. The other judges represented in that picture were: Benjamin Lynde, appointed in 1745; John Cushing, appointed in 1747, and Chambers Russell, appointed in 1752, with Chief Justice Hutchinson presiding.

At the time of the "Boston Massacre" in 1770, Governor Hutchinson said that he found it hard to persuade three of the judges to sit at the trial of the soldiers so strong was the popular feeling which John Adams and Josiah Quincy, Jr., faced in undertaking their defence. The judges, however, did sit and conducted themselves well. Their verdict was soon accepted as just. It is safe to say that Oliver, who was one of the judges, had no hesitation in sitting.

In order to give a background to the picture so that the memorandum of Judge Trowbridge, here published for the first time, may be better understood, it is necessary to bear in mind the situation which then existed. Judges were paid by annual grants and because of doubts of the temper of the legislature then the charter was modified so that judicial salaries were to be paid thereafter by the Crown. The town meetings protested and the legislature required the judges to say whether or not they would accept the salaries from the Crown. First, Judge Trowbridge, and then three of the other judges, declined to accept their salaries from the Crown, but Chief Justice Oliver accepted and his decision caused great excitement. The House voted that his action tended to "a perversion of law and justice", that he had been proved "an enemy to the Constitution of the Province" disqualified for his position, and prayed his removal.

Now Samuel Adams was the leader in the protest, but John Adams suggested the procedure for reasons which show his constructive genius at a dangerous crisis. His writings are so full of things written in all moods that in order to get his real service in perspective one must hunt for the most significant sentences in his diary, or later accounts, to get back into the atmosphere of the time and realize the situation which confronted him and the background of knowledge of the history of government which made him ready to meet a crisis.

Andrew Oliver, the brother of the chief justice, was the collector under the Stamp Act. In the excitement of that time he had been taken to the "Liberty Tree" near the corner of Essex Street and made to resign his office.

We will now let Adams tell his own story.

> "At this period the universal cry among the friends of their country was, 'what shall we do to be saved?' It was by all agreed, as the Governor was entirely dependent on the Crown, and the Council in danger of becoming so, if the

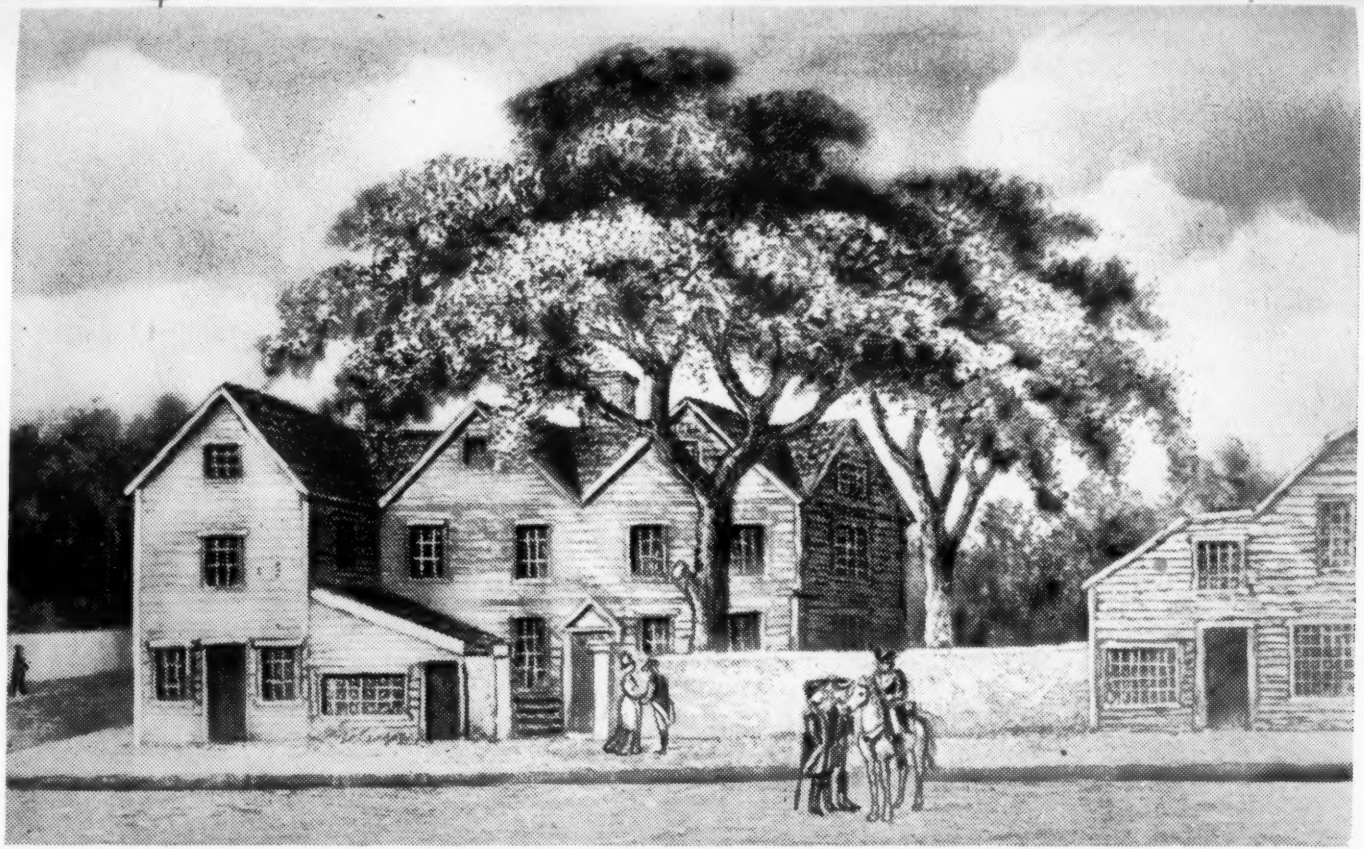
judges were made so, too, the liberties of the country would be totally lost, and every man at the mercy of a few slaves of the Governor; but no man presumed to say what ought to be done, or what could be done. Intimations were frequently given, that this arrangement should not be submitted to. I understood very well what was meant, and I fully expected that if no expedient could be suggested, the judges would be obliged to go where Secretary Oliver had gone, to Liberty Tree, and compelled to take an oath to renounce the royal salaries. Some of these judges were men of resolution, and the Chief Justice, in particular, piqued himself so much upon it and had so often gloried in it that the mob might put on him a coat of tar and feathers, if not put him to death. I had a real respect for the judges; three of them, Trowbridge, Cushing, and Brown, I could call my friends. Oliver and Ropes, abstracted from their politics, were amiable men, and all of them were very respectable and virtuous characters. I dreaded the effect upon the morals and tempers of the people, which must be produced by any violence offered to the persons of those who wore robes and bore the sacred characters of judges; and, moreover, I felt a strong aversion to such partial, and irregular *recurrences to original power.*" (Diary, Adams' Works, Vol. 2, p. 328.)

At a dinner at the house of Samuel Winthrop at which were gathered "counsellors and representatives the clergy" John Adams suggested impeachment by the House before the Governor and Council.* Next day Major Hawley, the leader of the House, conferred with Adams.

* John Adams in his diary of March 2, 1774, gives us his constructive reasoning as to the power of impeachment which is interesting as showing the actual thinking at this critical period.

EXTRACTS FROM DIARY OF JOHN ADAMS UNDER DATE OF "1774, MARCH 2, WEDNESDAY".

"Much said of the impeachment against the Chief Justice, and upon the question whether the Council have the power of judicature in Parliament, which the Lords have at home, or whether the Governor and Council have this power. It is said by some that the Council is too precarious a body to be intrusted with so great a power. So far from being independent, and having their dignities and power hereditary, they are annually at the will, both of the House and the Governor, and therefore are not sufficiently independent to hold such powers of judicature over the lives and fortunes of mankind. But the answer is this: they may be intrusted with the powers of judicature as safely as with the powers of legislation, and it should be remembered that the Council can in no case here be triers of fact as well as law, as the Lords are at home, when a peer is impeached, because the Council are all Commoners and no more. The House of Representatives are the triers of facts, and their vote impeaching is equivalent to a bill of indictment, and their vote demanding judgment is equivalent to a verdict of a jury, according to Selden. Are not the life, and liberty, and property of the subject thus guarded as secure as they ought to be, when no man can be punished without the vote of the Representatives of the whole people, and without the vote of the Council Board, if he can be without the assent of the Governor? But it is said that there is no court of judicature in the Province, erected by the charter only; that in the charter a power is given to the General Court to erect courts; that the General Court has not made the Governor and Council a court of judicature, and therefore it is not one, only in cases of marriage and probate. To this it may be answered, by inquiring how the Council came by their share in the legislative (The common form at this period of designating the law-making departmen:



FROM AN OLD PRINT OF THE LIBERTY TREE WHICH STOOD "IN THE OPEN SPACE KNOWN AS 'LIBERTY HALL' AT THE JUNCTION OF NEWBURY, ORANGE AND ESSEX STREETS" (SEE DRAKE'S "TEA LEAVES OF 1773," PAGE XXIV), I.E., WHAT IS NOW THE CORNER OF ESSEX AND WASHINGTON STREETS

"He drove away to Cambridge to consult Judge Trowbridge and appealed to his conscience. The charter was called for; Selden and the State Trials were quoted. Trowbridge said to him what I had said before, that 'the power of impeachment was essential to a free government; that the charter had given it to our House of Representatives as clearly as the Constitution, in the common law or immemorial usage, had given it to the House of Commons in England.' This was all he could say though he lamented the occasion of it.

"Major Hawley returned full in the faith. An impeachment was voted, a committee appointed to prepare articles.

. . .

"The articles were reported to the House, discussed, accepted; the impeachment voted, and sent up in form to the Governor and Council; rejected, of course, as everybody knew before-hand that it would be; but it remained on the journals of the House, was printed in the newspapers and went abroad into the world. And what were the consequences? Chief Justice Oliver and his Superior Court, your Supreme Judicial Court, commenced their regular circuit. The Chief Justice opened his court as usual. Grand Jurors and Petit Jurors refused to take their oaths. They never, as I believe, could prevail on one Juror to take the oath. I attended at the bar in two counties, and I heard Grand Jurors and Petit Jurors say to Chief Justice Oliver to his face, 'The Chief Justice of this Court stands impeached, by the representatives of the people, of high crimes and misdemeanors, and of a conspiracy against the charter privileges of the people. I, therefore, cannot serve as a Juror, or take the oath.'" (Works of John Adams, Vol. 10, pp. 236-240. Letter to Wm. Tudor.)

Such was the situation which is referred to in the memorandum of Judge Trowbridge.

Among the papers of Chief Justice Dana, now in possession of his great-grandson, Richard H. Dana, was found the following paper in the handwriting of Judge Edmund Trowbridge, who was a justice of the Superior Court of Judicature from 1767-1775. Chief Justice Dana married a niece of Judge Trowbridge and had studied

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of government). The charter says, indeed, that the General Court shall consist of Governor, Council, and House, and that they shall make laws; but it nowhere says the Council shall be an integral part of this General Court—that they shall have a negative voice. It is only from analogy to the British legislative, that they have assumed this importance in our constitution. Why, then, may they not derive from the same analogy the power of judicature? About nine at night I stepped over the way, and took a pipe with Justice Quincy, and a Mr. Wendell of Portsmouth. Mr. Wendell seems a man of sense and education, and not ill-affected to the public cause."

(See John Adams' Works, Vol. II, pp. 326-327.)

law under him as a young man which doubtless accounts for his possession of this paper. Chancellor Kent described Trowbridge as the "Oracle of the Common Law in New England." Having resigned his seat on the court at the time of the Revolution, he went to Byfield and lived there in retirement at the house of the father of Theophilus Parsons. He did this apparently because he was not free from suspicion of Toryism although never molested. While living in Byfield, where he brought his library from Cambridge, he devoted himself to teaching young Parsons law. As Chief Justice Parker stated in 1813 on the death of Parsons, "No other man except Chief Justice Dana had such opportunities to learn from Trowbridge." Judge Trowbridge, therefore, was the teacher of two of the early chief justices of the Supreme Judicial Court. The following paper is neither dated nor signed, but it appears to be clearly in Judge Trowbridge's handwriting and the last two sentences in it seem to explain his reason for writing it. The original is labeled on the back:

F. W. G.

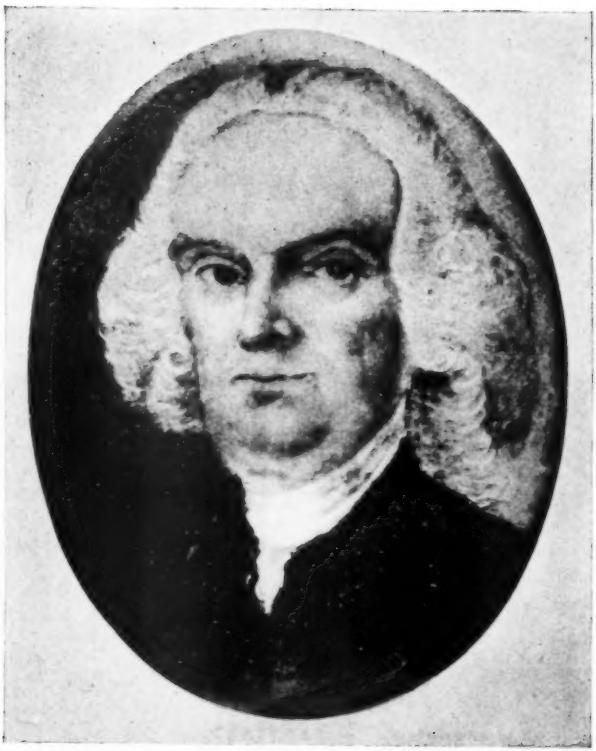
"JUDGE TROWBRIDGE

Concerning Judge Oliver's Not Sitting After Impeachment."

The paper is writen on eleven pages sewed together and reads

"Memorandum

"At Boston Court in August 1773 my Brothers Hutchinson and Cushing were very zealous for supporting the Honour of the Court, by Imediately fining everyone returned to serve on the Jury, That should decline taking the Oaths because the Chief Justice was Impeached by the House, and comitting him to gaol until he paid the fine—I told them that I Thought we should be far from supporting the Honour of the Court by such a proceedure. That I believed the persons so comitted would be soon liberated by the People, and that we should not be able to do the business of the County, but finding They disregarded what I said, and grew warm upon it, I determined to know Gov^{r}. Hutchinsons mind therein and, if he disapproved of the measure proposed, to desire him to let his Brother know it on The Saturday before the Superiour Court was to be held at Worcester in September 1773. I waited upon the Governor at Milton, laid the matter before him, and told him plainly what I Thought would be the Consequence of Such Fines & Imprisonments. The Gov^{r}. said 'I dont see how the Court can well avoid fining such jurymen as do, *merely* on account of that Impeachment, *persist* in their refusal to Take Oaths, but there is no need of comitting them *presently* for the fine, and it will be better not to do it.' I desired



JUDGE EDMUND TROWBRIDGE

OF THE

SUPERIOR COURT OF JUDICATURE, 1767–1775

his Excely to let his Brother know that his Opinion; & by his conduct at the Court I suppose the Govr. did.

"While I was at the Govrs. Comodore Loring & Joseph Scott came in, and gave the Govr. a Letter from Judge Oliver. While the Govr. was reading it, I asked them if the Chief Justice Intended to go to Worcester Court, both of them said he did; and was to set out on Monday. After they were gone I told the Govr. that I was afraid Judge Olivers going to Worcester would be attended with bad consequences, that there would be no Court held while he was there; and proposed his Excelys sending an Express to prevent his going. The Govr. said 'There will be no need of that, I don't think he will go' I told the Govr that Loring & Scott also said he would, upon which the Govr gave me the letter they brought him, wherein the Chief Justice wrote the Govr that he should not go to Worcester Court.

"Whether the Chief Justice made Loring & Scott believe he Intended to go to Worcester Court or whether they told in Boston that he Intended to go there, I know not; but 'tis certain that there were more People assembled together at Worcester on the day the Court was to be held than there used to be and they generally, at least, believed that the Chief Justice would be there. The Sheriff went as far as Oxford—To meet him, waited there until near eleven o'clock, and until a Traveler, who had lodged at a Tavern in the Road from Middleborough to Worcester about halfway between those Towns, told the Sheriff that he had not seen Judge Oliver, or heard of his being on ye Road, as the Sheriff on his return told us, & told the People also. Some Gentlemen enquired of me whether Judge Oliver would be at that Court, I told them I believed he would not, but did not think it advisable to let them know why I believed so.

"We delayed opening the Court until after Twelve o'clock that the People might be convinced that the Chief Justice would not be at that Court, and tho he was not then come, nor had been seen or heard of on the road yet the people were so fully resolved that he would be at the Court that many on that account who were returned to service as Jurors, objected to taking the oaths, unless the Court would 'assure them that if the Chief Justice did come, he should not sit as Judge' because they said, 'they could not in consience serve as Jurors, while one who stood impeached by the Representatives of the People, as an Enimie to the Country sat as a Judge.' The Court told them, that they could give them no such assurance; and said 'We have no right to say the Chief Justice shall or shall not sit as a Judge. That is a matter to be determined by the Govr. and Council, and until it is done you can without hurting your conciences, serve as Jurors and doubtless ought to do it.' But it plainly appearing that of those who were returned to serve as grand Jurors there were not Twelve willing to serve & being told that some of them said that if they could be together out of Court, they should soon all agree to take the Oaths, and it being then after

one o'clock we adjourned to Three but did not meet til near four when, as the Chief Justice was not come, nor had been seen or heard of on the road, the Persons Returned to serve as Jurors were sworn, and the business of the Court, went on as usual;—which I believe it would not have done, had the Chief Justice been there or had we fined those who objected to serving as Jurors, because the Chief Justice was Impeached by the House, & Committed and them for the fines.

"In May 1774. going to Barnstable Court I received from the Chief Justice a letter of ye Tenor following.

" 'Middleborough May 8th–1774

" 'Sir

" 'I had fully determined to go to Barnstable Court where I always went with Pleasure as I imagined I was among a Set of virtuous peaceable men & well affected to Government, but I cannot bear my part of the Burden of this Term with you, my reasons are these, Three or four days since one Dr. Freeman of Sandwich was at a Tavern in this Town, and before Several of my neighbours asked whether I intended for Barnstable Court. He was told Yes. He then said that there was an high Insult designed me at Barnstable if I went there, and sent his Compliments to me to call at his house if I went, as I knew where he lived.—This last I Took as the beginning of an Insult, for his Person I did not remember I ever saw; but his Character I am sufficiently acquainted with, for I was Informed that he left money at a Tavern at Plymouth to treat a set of infamous Villains who destroyed some of my property in Plymouth last winter. I am quite willing to attend my Duty at every Court, but if I cannot without danger to my Person I think myself excusable from the general character I had had of that Freeman and from what I have seen of a writing said to be his, and from what I have of his treatment of a Stranger, who Traveled thro Sandwich last Winter, I apprehend that his mind is so callous to every sentiment of Virtue that I should not dare without defensive weapons to guard me, which are not proper at all times to ride with, to pass within ye reach of that Malevolence which I think he is possessed with. I am Sir with all due regards for my Brethern of the Court ye most Humble Servant. Peter Oliver.
Judge Trowbridge.'

"I went to Barnstable and after the Court was adjourned by a Proclamation, returned on friday to Plymouth, where Deacon Foster delivered me a letter from the Chief Justice of the Tenor following.

" 'Middleborough May 13. 1774

" 'Sir Judge Hutchinson sent me a letter from Plymouth & says that if I did design to go to Plymouth Court I would let him know it. I think it my Duty to go there, especially as I am in my own County; for I cannot satisfye myself without doing my utmost to support the Dignity of the Court and the Law.

" 'Mr. Foster Tells me that the Council refused to join in the appointment of a new Judge. I have therefore two Questions for your Opinion; viz, Whether the words of the Province Law *That there shall be a Superiour Court to be held by One Chief Justice* and four Other Justices.' Will Justifie their sitting when there are only *four* in comission? Again—Whether upon a Grand or Petit Jurys refusing to be Sworn upon account of the late Partial Impeachment of me, the Court will proceed to fine directly on such or a similar excuse or will Chuse to Argue the Affair with them?

" 'This latter impression is founded upon my knowledge of the arts which have been used to insult me, and if the Court will not support me I will not go down to Plymouth. I am more anxious to try the force of the Law, and support the Dignity of the Court, as I can have enough in this Town and in Plymouth to guard my Person and I am Chiefly concerned for the Honour of the Court.

" 'If to the first Question you think we cannot Legally hold the Court, or if to the second Question you think that it is not best to proceed in the method I propose, I will not go to Plymouth: so that as you have an adjournment with you ready, as Mr. Hutchinson Informs me, you can proceed with what dispatch you think proper, and so prevent Mr. Hutchinsons Journey. be so good as to write an answer directly, and give it to Mr. Watson and he will Convey it.

" 'I am Sir Your humble Servant

Peter Oliver

The Hon^ble^ Judge Trowbridge'

"After reading the letter I let the Deacon see it. He said 'it will not do for Judge Oliver to come to Plymouth, Coll Watson and all his Other friends that I have talked with, are against his coming, and think the People will not let him sit if he does come.' I observed to the Deacon that Judge Oliver in his letter said he had enough at Middleborough and Plymouth to guard his Person. The Deacon said 'I very much doubt it, I wish you would go to him and advise him not to come' I replied, 'my going will be of no service, He is so Offended with me for Taking the whole of the salary granted me by the General Court, and making the Declaration required by the House, that 'tis not probable he wants to see me, or that he will be advised by me. He used to urge my coming to his House when on this part of the Circuit, but is so far from doing it now, that he rather forbids my coming there, so that I cannot with any Propriety go, you had better go yourself and tell him plainly what you have told me.' Upon which the Deacon said 'I came from his House this day, He knows my mind and Coll Watsons too; but that will not do unless you also advise him not to come, and tho he has not expressly desired you to come to his House, as he used to do, I believe he would be glad to see you there. He stands in need of your advice, give it to him, and thereby show him you are his Friend indeed; heap coals of fire on his head &c &c, by going you

may serve him, and the Publikk also, and you certainly will very much oblige me for I dread the consequence of Judge Oliver's coming to this Court, pray sir go and prevent it, if you possably can.' The Deacon, who I knew had a great regard for Judge Oliver, appeared to be fully persuaded, that his coming to Plymouth would be attended with very bad consequences to him, and his Friends also; that by going to him I might prevent his coming and was so very urgent with me to go—That I went to the Chief Justices on Saturday and Tarried there over the Sabbath. We conversed together upon the conduct of the House respecting the Judges, and their own conduct with regard to their Salaries, and the Declaration required by the House. I found that he did not like Foster Hutchinsons conduct any better than he did mine. 'Upon our Return from Falmouth Court Mr. Ropes & I lodged at Kittery, and there Mr. Ropes told me, that Mr. Hutchinson, upon seeing the Resolves passed by ye House respecting the Judges, declared that he would take the salary granted by the Gen[l] Court, and have no further trouble about that matter.' And among other things the Chief Justice said, 'My chief concern is to support the Honour of the Court, I have friends enough in this County to guard my Person, but it is the Court only that can prevent my being Insulted by the Jurors, under pretence of assigning reasons against their being sworn, and if I must be obliged to sit & hear, my being Impeached by the House assigned as a reason for their not taking the oaths, I will not go to Court. but as the Superiour Court is to consist of five Persons, and there are but four in Commission, and the Council has refused to join in the appointment of another Judge, I am of Opinion that we cannot Legally hold a Court.'

"After Informing the Chief Justice what our Friend Deacon Foster said with regard to his coming to Plymouth and attempting to sit in Court there, I said to him 'I shall not be for fining any man for not taking the oaths without hearing what he has to say against it, or giving him an opportunity of making his defense, if he chuses to do it. If one returned to serve as a juryman assigns a good reason against his being sworn, surely he ought not to be fined for not taking the oaths; If what he offers is not a good reason for this declining to take the Oaths, he ought to be told so, at some times it may be advisable to point out the Insufficiency of his excuse; If after being told by the Court that his excuse is insufficient and that he must either take the oaths or be fined, he persists in Refusing to be sworn, he may then with propriety be fined; and if what he offers is not only Insufficient to excuse him from serving as a Juryman, but is a Contempt of the Court, he may also be punished for the Contempt; but until the Court know what he would offer, if they would hear him, they cannot Judicially determine that it is Insufficient, or a Contempt.'

"I also observed to the Chief Justice, That altho the Superiour Court was to be held by one Chief Justice and four other Justices, yet that any Three of them were to be a Quorum. That the Court

had often been held after the death of one of the Justices before another was appointed. That it was, as I remembered, the greatest part of a year after Chief Justice Linde died, before another Chief Justice was appointed, that the Courts were held as usual in the Interim, and I never heard that ye Legality of those Courts or any of them was ever Question however, *as He was of Opinion* that We Could not Legally hold a Court, for the reason, by him assigned; and as I did not know the Point had ever been *otherwise* Judicially determined, I should give no opinion thereon without further consideration. Upon which the Chief Justice said he would not go to Plymouth. I returned there on Monday & the next day the Court was adjourned by Proclamation.

"It seems that while I was at the Chief Justices He wrote Gov^{r}. Hutchinson a Letter of the Tenor following viz. 'Middleborough May 15, 1774 Dear Sir I sincerely congratulate you on your present Relief from a most troublesome Government, and that your *Successor* General Gage is a gentleman of so amiable a characyer and who doubtless will act with firmness which is so absolutely necessary at this Important Crisis. I am sorry that you are obliged to retire to the Castle, but am persuaded you are quite right.

" 'I did not go to Barnstable by reason of Violent Threatenings; and the Gentlemen of the County thought me prudent for it. I was determined to go to Plymouth Court this week and great numbers of my neighbours urged me, and were to go with me; a number of Gentlemen also had agreed in Plymouth to meet me in the road, to escort me as a guard, and others in the Town to receive me at entering.

" 'On Friday last I wrote to Mr. Trowbridge in Plymouth, to let me know his mind, as to the legality of holding a Court at all, there being but four Justices in comission, and the Council refusing to appoint a fifth: as also to know whether the Court, if they met, would dispute with the grand or petit Jury on their refusal to Take the Oaths, or fine upon refusal. Instead of writing to me, Mr. Trowbridge came here on Saturday: I could obtain no answer to the first Question, and as to fining on refusal, I could not be supported, and so the Court is to be adjourned: and I am determined to make no farther attempts to sit in Court, until I can find myself supported in maintaining the honour of the Court, and securing my Person.

" 'As to the affair of the Grand Jury's libel at Worcester Court, I did not know of their conduct, until I saw it in the newspaper; and had any of my Brethren been charged in so infamous a manner, I would forever have quitted the bench, rather than have suffered such indignity to them, to have passed unnoticed. How it is possable to let a Brother Judge, a Friend, or even a brute to be treated in so Indignant a manner, I have no conception of in my Ideas of humanity; but so it is, and if the Supream Court is content with such rudeness, inferiour Jurisdictions are to be exculpated in suffering the commonwealth to be destroyed.

" 'I wish you could find a moment to tell me, when you desire to embark, for I shall be very uneasie to suffer myself not to see you before you leave us. I am dear Sir with the Sincerest affection.

Peter Oliver.

Gov. Hutchinson.'

"I knew nothing of this Letter until I saw it in the Boston Gazette of Monday September 18. 1775. Nor do I remember, ever to have seen the Libel therein referred, or that Judge Oliver ever said a word to me about it, or concerning any thing done, or left undone, by the Jurors, or Judges, or by any, or either of them, at that Court, nor do I believe he did."

(*Note—The difference in the accounts of the two men does not, of course, imply lack of veracity in either, it is simply an illustration of the sort of misunderstanding and difference of memory common in times of excitement. Oliver was obviously excited and the calmer account of Trowbridge has the appearance of accuracy.* —Ed.)

THE CONSTITUTIONAL CONVENTION CAKE OF 1820.

In Edward Everett Hale's book, "New England Boyhood," recently republished in a new edition and described by Mr. Mead as, "The only noteworthy book about Boston boyhood," appears the following story relating to the constitutional convention of 1820. Mr. Hale's father was editor of "The Boston Advertiser".

> "In the year 1820, the convention met which revised the constitution of Massachusetts. The 'Advertiser' published the full report of the proceedings, and this report was made up in my father's workroom, in the lower story of the house in Tremont Street. He was suffering at that time from an accident by which he nearly lost the sight of one of his eyes, and all his writing was done at home by my mother. So it would happen of an evening that the gentlemen most interested in the convention would look in at the house to revise the reports of their own speeches, and perhaps to consult about the work of the next day. Mr. Webster and Judge Story were two of the prominent leaders of that convention. They were on terms of the closest intimacy at our house, and would come in almost every evening for this purpose. Mother would be sitting in the room to do any writing which might be required, and, lest she should be called away to the baby of the time, the baby lay asleep in the cradle while the work of dictation went on. Speeches were made, proofs corrected, baby rocked, and undoubtedly a great deal of fun of such bright young people passed to and fro with every evening.
>
> Afterwards, in friendly recognition of the hard night-work of the winter, when the convention was well over, and its proceedings were published in a volume which is now one of the cherished nuggets of the collectors, mother had a great cake made for the workmen at the office. She frosted it herself, and dressed it with what in those days they used to call 'cockles' of sugar. These cockles generally had little scraps of poor verses, which were supposed to be entertaining. But in this case she had cut from the proofs the epigrams of the convention debates, and as the apprentices and journeymen ate their cake they found, to their amusement, that the work of their own hands had furnished what were called the mottoes."

QUEER TAX REASONING OF THE SUPREME COURT OF THE UNITED STATES.

In the case of *Blodgett* v. *Holden*, decided on November 21, 1927, the court held the Gift Tax Act of 1924 arbitrary and invalid under the due process clause of the 5th amendment as applied to gifts made in January, 1924, before the proposed act was presented for the consideration of Congress. Mr. Justice McReynolds, speaking for himself and three other justices, said, "It seems wholly unreasonable that one who in entire good faith and without the slightest premonition of such consequence made absolute disposition of his property by gifts should thereafter be required to pay a charge for so doing."

This seems a sound view, but the bar must have been surprised that the justices based that opinion on the existence or non-existence of a "premonition" as to what Congress might do or be asked to do. Premonition as a basis of taxation is the filmiest idea yet suggested. Four of the justices, speaking through Mr. Justice Holmes, agreed that the gifts were not taxable, but based their view on a carefully reasoned opinion that the act should be interpreted as applying only to gifts made after its passage. Mr. Justice Sutherland did not sit so that the court stood four to four on the reasons for the decision.

In the case of *Untermyer* v. *Anderson* decided on April 10, 1928, the same question arose as to gifts made in May, ten days before the final approval of the act by the president. A majority of the court, again speaking through Mr. Justice McReynolds, abandoned the "premonition" test, and again held the tax arbitrary and invalid, saying that "the tax payer may justly demand to know when and how he becomes liable for taxes—he cannot foresee and ought not to be required to guess the outcome of pending measures. The future of every bill while before Congress is necessarily uncertain. The will of the law-makers is not definitely expressed until final action thereon has been taken."

Mr. Justice Sanford concurred in the result without expressing his reasons. Justices Holmes, Brandeis and Stone dissented from the reasoning but, of course, concurred in the result because of their views expressed in the Holden case, that the act should be interpreted as applying only to future gifts. Mr. Justice Holmes, in a characteristically brief opinion, and Mr. Justice Brandeis in an extended opinion, support the power of Congress to make such a

tax retroactive. As all the justices agree in the result in both the Holden and the Untermyer cases, all of the opinions are practically *dicta*. It is curious that in all this reasoning there is no discussion of the question where Congress has power to tax gifts. In the opinion of Mr. Justice Holmes, however, appears this rather extraordinary sentence, "I do not imagine that the authority of Congress to tax the exercise of the legal power to make a gift, will be doubted any more than its authority to tax a sale."

In the name of common sense, why should it not be doubted? Without discussing the power to tax sales, there is certainly a difference between gifts and sales, at least, in the minds of those of us who compose the multitude of "ordinary men in the street." A sale simply changes one form of property into another form of property, but a gift is a voluntary reduction of a man's property. We had supposed that the power to give—the indulgence of a man's generous impulse—was the best incident of the right of ownership of private property, and an incident inseparable from the right of ownership—a right and not in any sense a privilege subject to *excise* taxation.

We believe this to have been the view of the framers of the Constitution and of the people of the United States during its entire history. We submit that there is no taxable privilege about it. If it be true that giving can be taxed, then it would seem to follow that any form of reduction of property voluntary or involuntary can be taxed, on the same theory, on which not only earnings, but involuntary, or so-called unearned, gains can be taxed. We cannot believe that the court would hold valid a tax upon losses or depreciation of property; although the gift act, in terms, classed as a gift the difference between market value and every bargain. This curious aspect of the act was, perhaps, overlooked by the court, as it was not directly invoked. But why not tax a man who loses property in the stock market or by ignorance or bad judgment in business, or in any other way, if you can tax a generous person who wishes to help somebody (not through some incorporated charitable organization), or to give somebody pleasure and add to the sum of human happiness? The definition of a direct tax has been uncertain ever since the Constitution was adopted, but whatever may *not* be a direct tax, how is it possible to conceive of anything more direct than a tax on reduction, whether by gift, or loss, or bad judgment in business? A man may lose property because he is careless in carrying it about. Why

may he not be taxed for his carelessness if his neighbor can be taxed for his generosity? It is not a mere question of expediency for Congress to decide, it is a straight arbitrary exaction of the most direct kind, and the Constitution contains a specific requirement of apportionment among the states for such direct exactions. And this is true, we submit, even in the cases that are called gifts "in contemplation of death." As we have pointed out before, the court has said repeatedly that the generating source of the taxing power of Congress in imposing the estate tax is the transfer by the fact of death. Death is not a fact until it has occurred, and we respectfully deny that a non-existent fact can be a generating source of the taxing power by any anticipatory theory which changes the absolute right of a living person to give away his property while he is alive into a privilege to transfer it by his death. If there was any one thing which the American people believed to be beyond the indirect taxing power of Congress, when the Constitution was adopted, and before the days of "organized charity", it was the Christian act of giving. We respectfully submit not only that there is very grave doubt of the authority of Congress to tax the exercise of the legal power to make a gift, but that there is no such power to tax without apportionment among the states.

In *Knowlton* v. *Moore,* Chief Justice White apparently assumed that a transfer "in contemplation of death" meant a transfer with a string to it, such as a gift "causa mortis" which did not become complete until death. The test is the *intention* to make a conditional gift, but the taxation of the "contemplation" of an absolute gift is the taxation of a *motive* or *mixed motive,* as distinguished from the effective intent to exercise the right to give and we submit that *motives* are not subjects of taxation. We deny the existence of any moral obligation of citizens to keep their property for the government to tax after death. The talk about "evasion" is argument by epithet. We submit that the American Constitution steps in at this point and protects the citizens from the authority of any English or other precedents for this form of exaction.

As soon as Congress, or the Court, leave the firm ground of the accomplished fact of death as the operating fact in the transfer and, therefore, the "generating source" of the power to impose an excise, they inevitably step into a quicksand of arbitrary selection, or *de facto* as distinguished from *de jure* classification, and resulting direct taxation. Such vague terms as "contemplation" as a basis of taxation to avoid "evasion" illustrate this. As Mr. Justice

McReynolds said in *Nichols* v. *Coolidge* (47 Sup. Ct. Rep. 710), "the mere desire to equalize taxation cannot justify a burden on something not within Congressional power" and this remark seems to answer his own premature and uncalled for dictum in the same case that an "evasion" tax on "contemplation" would be valid. We do not understand that the court has ever decided that.

Probably Thomas Jefferson reflected the views of "reasonable" Americans about taxation, when the constitution was adopted. In a letter to T. M. Randolph in 1792, Jefferson wrote in regard to a proposed Federal tax, "Besides its partiality, it is infinitely objectionable as foisting in a direct tax under the name of an indirect one" (Ford, Ed. VI, 149), and in another letter to Dr. George Gilmer he said, "As to call this a direct tax would oblige them to proportionate among the states according to the census, they choose to class it among the indirect taxes" (Ford, Ed. VI, 146). In 1799, in a letter to Pendleton, Thomas Jefferson referred to the "disgusting particularities of the direct tax."

The natural and plausible common argument in support of every kind of extension or abuse of Congressional power when it comes before the court is, of course, that Congress has already gone so far in this general direction by doing this, that, or the other, that the court cannot logically or reasonably draw a line at the latest step without "usurping" power. This sort of argument is a good deal like saying that, because a young man has been squandering his income, but has had the self-restraint not to waste his principal, the fact that he has been wasting his income is a reason why he should throw away the rest of his character by wasting his principal, also, and thus destroy his reserve force so that he will have nothing left with which to "brace up."

One is reminded of Jefferson's other remark in 1781 that a legislative despotism "was *not* the government we fought for."

We submit that the part of the Federal estate tax law which attempts to tax *completed* transfers *inter vivos*, made either before or after the passage of the act, by a definition including them in the gross estate, is unconstitutional as a direct tax on motives and is an arbitrary extortion based on a false fiction of "evasion" of a non-existent and unnatural obligation to the government by the exercise of the perfectly honest and natural power of giving which is the best incident of the right of private property at the foundation of civilized society.

F. W. G.

PROPOSED ACT TO ABOLISH THE JURISDICTION OF THE FEDERAL COURTS BASED ON DIVERSITY OF CITIZENSHIP.

S. 3151.

IN THE SENATE OF THE UNITED STATES.

February 13, 1928.

Mr. Norris introduced the following bill; which was read twice and referred to the Committee on the Judiciary.

A BILL.

To limit the jurisdiction of district courts of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first paragraph of section 24 of the Judicial Code, as amended, is amended to read as follows:

"First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue."

Sec. 2. The provisions of this Act shall not affect suits commenced in the district courts, either originally or by removal, prior to its approval; and all such suits shall be continued, proceedings therein had, appeals therein taken, and judgment therein rendered, in the same manner and with the same effect as if this Act had not been passed.

The President of the *Massachusetts Bar Association* has sent the following letter to Senator Gillett and a similar letter to Senator Walsh protesting against this bill.

APRIL 6, 1928.
N/Gi

HONORABLE FREDERICK H. GILLETT,
United States Senate,
Washington, D. C.

DEAR SENATOR GILLETT:

We are much surprised here at the bill which has been introduced by Senator Norris and is now reported, known as S. 3151, which takes away from the United States District Court all jurisdiction based upon diversity of citizenship. We understand that the Judiciary Committee gave no public hearing on the bill at all.

It is a very serious proposition to alter thus the course of procedure which has been established for over a century and will deprive our citizens of the opportunity they have heretofore had of enforcing their rights through the United States Court. They will, therefore, be compelled to go into the state courts where, of course, there is much more local prejudice in favor of the citizens of the state as against citizens of another state, and where the judiciary may not be of the same caliber as the appointments made by the President of the United States.

We all hope that everything will be done to defeat this bill. At all events such a bill should never be reported without an opportunity for the people of the country to have something to say about it.

Very truly yours,

GEORGE R. NUTTER,
President.

THE VOTE REQUIRED TO PASS AN ACT OVER THE GOVERNOR'S VETO IN MASSACHUSETTS.

(This discussion also appeared in the Boston Transcript of April 17, the Boston Herald of April 18, and the Springfield Union of April 18, 1923.)

The recent ruling of the president of the Massachusetts Senate that "two-thirds of the members present and voting" was enough to pass the act permitting sale of food on Sunday over the veto of the governor raises a serious question of constitutional law. While the ruling is supported by two former presiding officers in 1862, it is distinctly contrary to the considered opinion of Attorney General Parker in 1904 (See 2 Op. A. G., pp. 513-521). Mr. Parker considered the previous rulings of the presiding officers referred to and respectfully disagreed with them. I think it is clear as a matter of history that Mr. Parker's view is correct and that the view of the president of the Senate is mistaken and that the recent act in regard to Sunday sales has not become a law.

The question concerns the interpretation of the Massachusetts Constitution. The Committee of Thirty appointed by the Convention of 1779-80 to draft a constitution in turn appointed a subcommittee of three, consisting of James Bowdoin, Samuel Adams and John Adams, who, in turn, requested John Adams to prepare the first draft. The draft thus prepared and discussed by the sub-

committee and then by the Committee of Thirty and reported to the convention contained at the beginning of the "Frame of Government" the sentence, "And the first magistrate shall have a negative upon all the laws—that he may have power to preserve the independence of the executive and judicial departments" (See Journal of the Convention, p. 197). This sentence was "largely debated" and rejected. Subsequently, the language now appearing in the constitution was agreed upon (See Journal, pp. 126, 132-133 and 151).

The present language of the constitution provides that "If two-thirds of the senate or House in which soever" a bill "originated" . . . "shall" . . . "agree to pass the same" over the governor's veto "it shall be sent to the other branch of the legislature, where it shall also be reconsidered, and if approved by two-thirds of the members present, shall have the force of a law."

This language providing for a qualified veto was adopted after close study and vigorous debate instead of the absolute veto reported by the Committee of Thirty. There was no careless use of language. It was a carefully worded substitute for the committee's draft intended to require a larger majority in one branch than in the other to insure greater consideration before the legislature overrode a governor's veto. This idea is expressed in clear words. The bill referred to "originated" in the Senate and the vote to pass it over the veto was not two-thirds of the whole Senate.

The president of the Senate is quoted in the press as relying in support of his ruling on an opinion of the Supreme Court of the United States in *Mo. Pac. R. R. Co.* v. *Kan. 248 U. S. 276,* as to the meaning of the Federal Constitution. But the language of the Federal Constitution differs from that of the Massachusetts Constitution. Furthermore, the decision referred to was rendered, as has been recently pointed out, apparently without knowledge of the fact that Gouverneur Morris, the final draftsman of the Federal Constitution, stated his understanding in 1804 that the language of that constitution required "two-thirds of the whole number" of each house to over-ride a president's veto to expel a member or to submit an amendment to the constitution (see discussion by Eliot Tuckerman, Esq. in a communication to the New York Legislature reprinted in MASS. LAW QUART. for May, 1927, pp. 2-3).

F. W. GRINNELL.

April 17, 1928.

At a recent meeting of the Executive Committee at which sixteen out of the twenty-five members were present, it was voted that the president should appoint three special committees to consider and report to the Executive Committee as follows:

1. On the question of creating a standing or special Committee on Legal Aid and a plan for its functions. This was a matter referred at the annual meeting. The president appointed to this committee Hon. Oscar A. Marden, Messrs. George H. Mirick, and Raynor M. Gardiner;
2. On the possibilities and expediency of a plan of state annotation of restatements of the American Law Institute for Massachusetts similar to the plan now being tried in Michigan. The president appointed to this committee, Messrs. Raymond S. Wilkins, George K. Gardner, and the Secretary;
3. On the advisability of creating a standing committee on Federal legislation and the possible functions of such a committee and the branches of Federal legislation to which it should devote its attention if created. The president appointed to this committee, Messrs. Dunbar G. Carpenter, Daniel T. O'Connell, Lee M. Friedman, Fitz-Henry Smith and Odin Roberts.

The Executive Committee also voted in favor of legislation to increase the salaries of Supreme Judicial Court, the Superior Court and the Land Court.

LAW, LIFE, AND LETTERS. BY THE EARL OF BIRKENHEAD.

New York: George H. Doran Co. 1927. Two volumes. pp. 296, 326.
(*Reprinted by permission from Harvard Law Review for March, 1928.*)

There is a theory that a Lord Chancellor so far embodies everything excellent in the law that his office or even his having held that office should be incompatible with too facile a pen. Lord Brougham and Lord Birkenhead are two notable exceptions in practice. They form a class by themselves, although if quantity of words be the test it is a class for which Lord Eldon and Lord Campbell may have qualified. But Lord Eldon's writings are his judgments, and Lord Campbell's *Lives of the Lord Chancellors*, though "adding a new terror to death," functioned only in their limited field. Lord Brougham and Lord Birkenhead acknowledge no limit of speed, quantity, or field. It is true that the latter has agreed that while he is Secretary of State for India he will cancel his newspaper contracts and confine himself to books. But even with that limitation, if he shall equal Lord Brougham in years of life, he will certainly greatly excel him (or shall we say exceed him?) in the written word.

Here we have two volumes of collected papers increasing the already large number of published works by this prolific author. The first and most notable thing which strikes the mind of the critical reader is the special style or diction — the journalese and the English skilfully combined to apply the happy dispatch to the subject or, when the author is tilting, to his adversary. The form of speech principally employed to this end is the superlative. In American trade there was once a tradition that the sample should be above the mass, and on Main Street and in the Bowery before the application of pure food principles to advertising there used to be signs praising shoes as "sample shoes." Lord Birkenhead's swans are all sample swans. Even when he mentions his own achievements, no bird ever cackles. A fair minded critic would not wish to say that without balancing it—we are dealing with the work of a man of great ability and, in this reviewer's opinion, most of its admissions of greatness are fully justified. But to recur to examples of the superlative, King Edward the Seventh is held up by this ennobled Mr. Smith as the best of sample goods—the "Con-

stitutional Monarch who most completely answers to the type of the wise King." And the rapier, playing delightfully, pricks "Margot Asquith" deep at all the points where she would wish to consider herself invulnerable. Lord Birkenhead must have chuckled with his tongue in his cheek when the only superlative praise in his review of her book was his tribute to her "indestructible youth." But her censure upon his Glasgow rectorship address and confession of faith had struck home and caused some smart. His reply is a jibe that "she never understood high politics." That again was an error of speaking too much in the superlative. Sir Joseph Porter would have said "hardly ever."

And Lord Birkenhead's substance would be more convincing if he has avoided the feature which is criticized in his form, especially if he had done it by giving some account of the cases the lawyer lost or the occasions upon which the politician was wrong. Mr. G. K. Chesterton has written some rather well known verses, which review and comment upon our author's speech about the Welsh Disestablishment Bill and which may be referred to with amusement. The bar and students of the law could learn much from a good account of the Sir John Scott will case. That was in part a tilt between opposing counsel Smith and Carson and in part a test of wits between "F. E." and his principal adverse witness, Lady Sackville. And Sir F. E. Smith's defeat cannot be accounted for entirely by the greater merits of his opponent's case. Then, there is a passage in the history of Antwerp during the first German advance, which might be added to qualify Lord Birkenhead's admissions that he is almost the perfect politician.

His career and his style both tempt one to a review broader than the book under immediate consideration. *Per contra* the book tempts one to read his other works. And anyone who will read not only the book now under review, but also enough more to complete the understanding of this glittering personality, will be glad that he has yielded to such temptation. The adjective is of Lord Birkenhead's own choosing. In that same Glasgow address he chose it to be a sort of plume for his admirable knight errantry. But one feels rather pity when such an expert in jousting places his lance at the service of the low side of political hack writing. He is too big a man to write bunk and it is bunk or worse to say, as he does in the book under review, that "a febrile and hysterical minority of our population is inclined to take its orders from the decaying and blood sodden system of Moscow."

Justice compels an ending upon a different note. This is the real hero who has used his mace to demolish that legendary monster called the rule in Shelley's case. It lives no more in the England where "Lord Birkenhead's Act" has earned the profound gratitude of all interested in the English law of real property.

RICHARD W. HALE.

Boston, Massachusetts.

JUDGE MARCUS KAVANAGH'S VIEWS ABOUT JUDGES AND JURIES.

(*An extract from his recent book "The Criminal and His Allies".*)

This book is written primarily for the information of the general public by a judge of thirty years' experience in the criminal courts of Cook County, Illinois. It is an unusually vigorous and straightforward discussion. It might well be read by every judge to stir his administrative imagination out of possible judicial ruts; by members of the legislature to show the nature of the different problems, as to which the public is being informed; and by lawyers to make them think harder and more responsibly about their profession. We may agree or disagree with this or that view; but the book is written to make people *think*.

The following extract relates to a matter which is frequently discussed in Massachusetts:

EXTRACT FROM JUDGE KAVANAGH'S BOOK (pp. 207-215).

"The law which takes from the judge the duty to lend his learning and experience to the solution of the issues involved adds to the opportunity of the advocate. On through our history the lawyers in the legislature have controlled the lawmaking of the nation and so from revolutionary days to this day the lawyers in the legislature have never been willing to relinquish that power wherever it has been embedded in the statutes.

"Before the federal courts became suffocated with prosecutions under the Volstead Act, their character, for the proper administration of justice, stood immeasurably above that of the state courts. In the former, the judge might exercise his wisdom and experience as well as his learning in pointing out to the jury the relevancy and effect of the testimony. In the state courts, the jury must depend upon the hired advocates on either side for this help.

"Not long ago, in one of our Middle Western States, a judge, lulled by the buzz-saw drawl of a monotonous cross-examination, fell asleep on the Bench. Through fifteen or

twenty minutes the questions of the lawyer and the answers of the witnesses were staccatoed by the trumpetings of the judge. Presently His Honor aroused himself into an effort to appear as if nothing had happened.

"On that account, the beaten party asked the Supreme Court to send back the case for another trial. He argued that a litigant was entitled to the presence of the presiding justice all through the trial and that such presiding justice could not be said to be present when his mind rode on clouds to happy dreamland. He explained that he and his client were not to blame for not waking His Honor in that His Honor was of a disposition which made him dangerous when 'woke up.' But the upper court answered, 'No.' It said that no harm seemed to have resulted from His Honor's slumbers. By inference it seems to follow that it is not necessary for a judge to know all the facts in a case tried before him, and this inference fits in snugly with the general theory as to the functions of a judge in the trial of a case in most of the state courts. Moreover, as it was pointed out, if that same judge had awakened to take an active interest in the case, had thought a witness might be lying and had asked a half dozen questions which developed whether the witness was telling the truth or committing perjury, the Supreme Court would have reversed the judgment. The presiding judge in forty states must keep his hands off the facts. The lawyers will settle that part of the battle between them, and the smarter the lawyer the more clearly are the facts brought out on his side of the case.

"It was a delight to hear the late Lord Chief Justice Alverson instruct a jury. First of all, he explained so simply that a child might understand what we lawyers called the 'issue.' That is, he brought to meet each other the main facts about which the lawsuit arose and explained clearly the cause for the quarrel. Around these points of difference, he marshaled the facts in evidence, taking up and exposing each fact, so that one could see under it and around it. He gave his opinion as to the weight of the evidence, but warned the jury that they were not bound by his opinions on the facts, and that he would loyally stand by their verdict if they disagreed with him. Then, above the facts, he lifted the law as one might life a lamp. Any one could understand him. His language and illustrations were for a schoolroom of children.

"The jury system is of inestimable value. No one ever advocates its abolition in the jurisdictions where the judge takes part in the trial. It is better to have the judgment of twelve disinterested, unprejudiced and unsympathetic men on a question of fact, than the opinion of any single individ-

ual, no matter how wise he may be. No two men view life from the same angle. The experience of the laborer varies from that of the merchant. Great dangers of error arise from an improper influence of the emotions, either of prejudice or sympathy, and from a misconstruction of the law.

"In the countries where the law permits a defendant to waive a jury and have his case tried by a judge, the accused chooses the judge as often as he chooses the jury. A certain amount of latent coercion seems probable in this choice of one instead of many. An unexpressed hope that by the subtle compliment the magistrate may be lenient, an unspoken fear that if the jury find him guilty after the delay, expense and trouble of a trial the sentence of the judge may fall heavier on his head, these things may influence the defendent in surrendering his right to trial by jury. Certain it is that a law which thus permits a trial without a jury may save trouble, delay and expense, but every trouble, delay and expense necessary to a free, fair and impartial hearing, when life or liberty is at stake, is time, trouble and money wisely spent.

"The Canadian record for 1924 is of interest and value. In that year, of the cases which might be left to a jury, only 1,115 were so heard, and in these there resulted 607 convictions and 508 acquittals. Out of the 3,408 cases in which a jury was waived for trial by a judge, there resulted 2,356 convictions and 1,052 acquittals.

"An experiment made in my court demonstrated clearly the value of the jury in criminal cases when properly instructed.

"One can not expect a brickmason or banker to come into the jury box and there without mistake transact matters entirely foreign to his daily habit, especially when clever men well used to the trade exert their best ability to mislead him.

"Last year, in view of this situation, I adopted an expedient. On the first morning the jurors were to serve and before any case was called, all the members of the panel were called forward and seated within the Bar. Then for an hour and a half or two hours, without reference to any particular case, after a warning that what was to be told them was not binding, but only advisory, and was to be disregarded in any trial where instructions to the contrary were given, I talked about their function and its responsibility to the state and to the accused. I repeated the stock instructions, which they probably would receive, and, explaining their purpose, illustrated them by examples. In a general way the practise and procedure of the court was made clear, as well as the use of the different rules of evidence.

"Most lawyers and judges contend that my action in this regard was without any authority of law and irregular. There are two sides to that question. If there is no law for it, there is no law against it. At any rate the result was that from September 1, 1925, till September 1, 1926, out of nearly one hundred verdicts, the juries in my courtroom rendered only three which I myself would not have given. Concerning one of those three, I question more and more my own judgment as time goes on.

"Last winter I tried another experiment with a jury. Its success astounded every one who knew of it. An American flag on its staff hangs over the Bench in my courtroom. I keep it there because sometimes when one is tired and discouraged, to turn and look at its beauty and glory rests one's eyes and cheers one's heart. Well, a case was just finished before another judge in the same building. It took more than forty days to get a jury, and to get that jury had cost the taxpayers more than thirty-five thousand dollars. Just eight hundred eighty-seven citizens, men generally regarded as responsible, had gone into that jury box, of whom eight hundred thirty-five had disqualified themselves by their answers. It would not be unfair to estimate that seven hundred seventy-five of these committed perjury to escape a high patriotic service. In another case before another judge nearly five hundred citizens had a short time before disqualified themselves in the same way.

"A criminal case which had attracted national attention appeared on my call for the coming Monday morning. The court attachés prophesied that a jury could not be chosen in less than three weeks. The Friday afternoon before the case was to be called, I summoned all the jurors from all the other courtrooms into my own and informed them that this trial would commence Monday and that any twelve of them might be selected to hear the case. I told them from the Bench that the twelve selected would be kept living in a hotel away from their business and their families for maybe weeks. I called their attention to the fact that in order to escape a little service eight hundred thirty-five men in one courtroom, and four hundred sixty in another, had disqualified themselves by their answers and pointed out how they might do the like if they wished. I even suggested the particular kind of answer to the lawyer's questions which would disqualify them.

"Then I added: 'However, gentlemen, before you give these replies, I wish to remind you that a few years ago seventy-seven thousand young men with families and friends who loved them, and affairs which needed them, took up the flag you see bending above us and at the call of their state

and country carried it across dangerous seas; laughing, they bore it through whirlwinds of shot and shell up to the blazing mouth of the cannon. They dyed its folds a deeper crimson with their young heart's blood and with their expiring souls lent a new and tender splendor to the eternal glory of its stars. They will never come back. They answered their country's call, and for reward they sleep under little white crosses in foreign graves. At the time they went away, the public prints told of two young men who went out into the park and to escape that service each shot off one of his fingers.

"'Now, gentlemen, you can come into court Monday morning and mutilate your souls, just as those two contemptible cowards mutilated their bodies. No one will know it, it will lie with you, your country and your God. But if you are worthy of your citizenship and of the memory of its martyrs, you will gather under the shadow of that flag Monday morning and do your duty.'

"Strange as it may seem that homely little talk awoke the sleeping giant. An unheard-of miracle followed. Monday morning these jurors came thronging into my courtroom, nearly every one of them carrying a little package or valise containing his comb, brush, shaving utensils and night clothes, determined to see the case out. It did not take three weeks to get a jury. It took just one hour and a half. Not a man sidestepped. The giant in every bosom started to his feet and answered every question like a man. It took three days to try that case, instead of a month. We must not despair of our country. The giant in our soul is not dead, he is only sleeping and not so heavily at that. Even now he tosses in uneasy dreams.

"It should be the function of the judge to guard the jury against improper influence and to let the law shine clearly into the darkest corners. Then, too, he should be permitted to drag out the facts which have been left obscured or misunderstood. If he suspect that a lie is worming its way into the verdict, he should extract and expose it. In other words, the judge should not be an automaton, merely nodding yes or no in the trial, but an actual force concerned not that one side or the other may win but that truth shall prevail; a person of impartial power, adding his experience of fact to the experience of the jurors and joining his skill to that of counsel in bringing out the naked truth.

"This was the office of a judge at common law; it is his function in the federal courts and in a few states where, until lately, the administration of justice shone brightly. We shall make no greater step toward an ideal administration of justice than to give the power to conduct a trial to the judge

who presides, and to place the responsibility of the trial on his shoulders.

"Under the system which prevails in most of our state courts, the conduct of a criminal trial is transferred by force of statute from the hands of an experienced, impartial magistrate to the eager partisanship of the hired lawyers. It transforms the sworn judge into a mere ringside referee who must regard himself as without care whether the wrong or the right party wins, so long as the champions fight according to the rules of the roped arena.

"This system does not concern itself so much with whether the victory shall rest with the just cause, but rather that success shall fall to the smarter lawyer.

"Through a criminal trial, the judge must be present, but he shall not participate, no matter how sorely justice may need his assistance. He may recognize falsehood cunningly disguised passing for truth, but he dare not lift a warning finger; every day at his side some honest witness, struggling to publish the truth, writhes confused, embarrassed and badgered into appearance of falsehood, yet the judge must stop his ears and let the disaster wear itself to the untoward finish. Clean character may be successfully aspersed, a good reputation mendaciously assailed, false charges against innocent and remediless witnesses may be broadcasted from his courtroom, but the judge is forbidden to expose the mendacity. When by subtle, clever and compelling appeals, racial, religious or other passions, prejudices and sympathies are set on fire, he is commanded to turn his face away so that even his manner shall not betray his discontent. In other words, the judge may see all the instruments of fair play changed into weapons of oppression and although he has the power, he has not the right to interfere.

"If we desire an improvement of criminal justice in America through the exercise of judicial power, the first step in bringing this about must be to abolish this grotesque travesty on civilized legal procedure and leave restored to the sworn representative of impartial justice his ancient authority to participate actually in the trial. The most striking difference between the trial of a criminal case, in an English court and one in an American court, arises from the parts played by the judge. In an American court, the lawyers conduct the trial; in an English court, in the words of Sir John Simon, they 'assist the judge in the trial.' An English judge feels it to be his first duty to see that actual justice prevails, to promote fair play, to expose tricks and to frustrate falsehood. He examines witnesses at length to get out the facts and in his instructions endeavors to make the jury understand the relations of facts to one another and

to the law. He conducts the inquiry past all shams straight to the heart of the question: Is the defendant innocent or guilty? Who will maintain that with such a system the mere exercise of judicial power is not of incalculable benefit to the administration of justice? Yet an attempt to substitute such a system for our own pathetic policy would awaken the antagonism of almost every lawyer in any American legislature.

"Mr. Justice Hand of the United States District Court of New York reached far toward the sore heart of the problem when he said:

'The fundamental trouble I believe to be in the belief that liberty and property must be protected by an over-complicated formalism, that legal mechanism can be successfully substituted for the competent and responsible judge. I believe the inevitable result of that attitude will be a cumbersome, slow, uncertain and irksome enforcement of the law. We shall have no substantial improvement while the responsibility for the result is laid directly to the judge of first instance, and while with that responsibility, he is not given the power more unconditionally to control the result. There is in my judgment no substitute for capable trial judges with large powers.'

"The restoration to the judiciary of the country of their original authority over the trial of cases would, in my judgment, accomplish more in raising the dignity of the American bench to its old-time prestige, and in establishing a surer, firmer administration of the criminal laws, than any other legislation possible."

We believe that the so-called "Caraway" bill to "hamstring" the Federal Courts, which has recently passed the Senate, is an unconstitutional interference by Congress with the administration of justice for reasons stated in MASSACHUSETTS LAW QUARTERLY for August, 1918, pp. 347-357.

F. W. G.